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THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

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MINING REPORTS.

VOL. VIII.

WALKER ET AL. V. FLETCHER ET AL.

(3 Bligh (O. S.), 172. High Court of Chancery, 1804.)

Repeated inspection—Removal of obstructions. Form of order allowing repeated inspection, with viewers, and the power to remove obstructions, with the facts upon which it was based.

In this case it appeared from the allegations of the bill, supported by affidavits, that the plaintiffs being possessed of divers mines of coal at, etc., which they had for a long time (then) past wrought in copartnership; and that John Harris then was seized in fee, in trust for all the plaintiffs, of a close of land, with the mines of coal under the same, which at the east end abutted on a certain close belonging to the defendant John Fletcher, called the Seggs, and on the south side on another close called Flowered Moss; and that the defendants had begun to work the same; that there was under the close belonging to the plaintiffs, called Flowered Moss, and the other closes, called Flowered Moss and the Seggs, a mine or vein of coal of very considerable value; and that the defendant John Fletcher, together with the defendants Joseph Steel and John Wilson, then were, and for some time then past had been, carrying on and working divers collieries and coal mines in copartnership; and the defendants, as such copartners, or their servants and workmen, about three years before, had sunk a coal pit and erected a fire engine in the close of the defendant John Fletcher, called the Seggs, at the distance of about 50 yards from the plaintiffs' close called the Flowered Moss, and had ever since worked the said colliery,

and had carried on their works from the engine pit to the rise of the colliery toward the plaintiffs' close; that the defendants had driven and carried their works toward the southeast corner of the plaintiffs' close, and had caused a drift or course of great width to be dug from the southeast corner, under the plaintiffs' close, for the length of 70 yards and had also driven four or more boards or drifts out of their colliery into the said drift or course, and had taken from under the plaintiffs' close very great quantities of coal belonging to the plaintiffs, which was done unknown to the plaintiffs, and without their privity or consent; that the plaintiffs had (then) lately begun to sink a coal pit in their close called Flowered Moss, and had thereby or otherwise discovered that the defendants, or their several workmen or agents, had dug or taken such coals as aforesaid. That a few weeks after the sinking of the pit was begun by the plaintiffs, the defendant Steel was present and declared that the plaintiffs should never have a colliery or pit there, or to that purport or effect. That every means to prevent the same had since been used by the defendants, and when the defendants found that such their workings under the plaintiffs' close had been discovered, they caused part of such workings which laid near the pit sunk by the plaintiffs to be filled up, and also plugged the bore-hole, and made barriers and walls in their workings under the closes called the Seggs and Flowered Moss, or one of them, and had filled the same with wood, earth, clay and other materials, and thereby prevented the water flowing from the coal under the plaintiffs' close, in such manner as it had before done, and the pit which the plaintiffs had begun to sink and dig was thereby overflowed with water to the depth of four or five yards, so that the plaintiffs were prevented from working in and sinking the same; and the water also, by being so stopped in part, forced and extended itself to another colliery which the plaintiffs were working, and which was near a quarter of a mile from the defendants' Seggs close, and was likely to extend much further and considerably to injure such last mentioned colliery. That from the proceedings of the defendants, which they still continued to pursue, and threatened to carry on to a much greater extent, unless such plugs, walls, dams and barriers were taken away, the plaintiffs were in great danger of

losing the whole benefit and enjoyment of their mine or vein of coals under their close, and their workings in other places might and would be greatly damaged; and the defendants by continuing to carry on their workings under the plaintiffs' close had taken and got from under the same great quantities of coals of great value; that in order to discover, and if possible to prevent the proceedings of the defendants, and the injury done thereby to the plaintiffs' colliery, the plaintiffs had caused to be sunk in their close, the pit before mentioned, which was of the width of five feet, and of the length of seven feet; that the nearest part of the pit was six yards from the defendant's close called the Seggs; and that when it had been sunk to about the depth of 32 or 34 yards, the plaintiffs caused a perpendicular hole to be bored down to the coal, which was at a depth of 35 fathoms, or thereabouts, from the surface, and they found the coals at the bottom of such bore-hole entire; but having had reasons to suspect, from the proceedings of the defendants, and the observations and threats used by them shortly after the plaintiffs' pit was first begun, that the coal had been wrought and taken away within a very short distance of such hole, Jeremiah Harris and Joseph Muncaster, on behalf of the plaintiffs, requested leave of the defendant John Fletcher, and also of the agents or workmen then attending the defendants' colliery, that Jeremiah Harris, as coal agent of the plaintiffs and other persons then present, and along with him, might be permitted to go down into the defendants' coal mine and view the works, but the defendant John Fletcher refused to comply with the application, unless Jeremiah Harris could show a legal authority to enable him to do so.

That the plaintiffs, not being able to obtain view of the defendants' colliery by means of such applications, the plaintiffs caused an oblique hole to be bored in their pit, so as to strike the coal at a little distance from the perpendicular bore-hole; that the oblique bore-hole was made in the hollow works made by the defendants under the plaintiffs' close, called Flowered Moss, and was between five and six feet, or thereabout, on the east side of such perpendicular hole, and when the boring rods in such oblique state had reached the depth of the coal, which happened on or about the 8th of September, then last, the boring rods entered into the hollow working

made by the defendants under the plaintiffs' close, and four or five yards, or thereabout, to the west of the boundary line between the plaintiffs' Flowered Moss close and the defendants' Seggs close; from which workings the defendants, their servants or workmen, or some of them, had taken or carried away the coal; and on further examination it had appeared that the defendants, their servants and workmen, had taken and carried away the coal under the plaintiffs' close, to within 18 inches or two feet, or thereabouts, of the first perpendicular bore-hole; but the defendants having refused to permit the plaintiffs or their agents to go into and examine their workings, the plaintiffs were not able more particularly to set forth the extent of the workings of the defendants, nor the quantities of coal the defendants had taken from under the same. That the defendants had then blocked up their workings, or some of them, under the plaintiffs' Flowered Moss close, by placing framed walls, earth, rubbish, or other works or inventions, to prevent the plaintiffs and their agents having any access to the same, or making any discovery of the injury done by the defendants to the plaintiffs; that the mine or vein of coal under the defendants' Seggs close, and part of Flowered Moss close, belonging to the plaintiffs, which adjoined thereto, dipped to the south, and therefore inclined from the place where the plaintiffs had sunk the pit toward Seggs close; and that such vein of coal was covered with a bed of coal-metal about eight yards thick, which was covered with a bed of stone about four yards thick, which beds of coal, metal and stone also dipped in the same direction as the coal, and that the water flowed down sunk beds toward Seggs' close. And that soon after the plaintiffs had bored the first mentioned oblique bore-hole in the workings, made by the defendants under the plaintiffs' Flowered Moss close, their servants or workmen had put, or caused to be put, a plug or plugs of wood and iron into such bore-hole, and also made or erected walls, fences or barriers in the drifts or workings, which they had filled with earth, clay, stones and other materials, with intent to make the same water-tight, and thereby prevent the water running down from the coal; and the water soon afterward began to run, and did afterward rise in the pit to the height of four or five yards, which was then dug down to just within the bed of

stone only; that the plaintiffs had since endeavored to let the water pass the pit, and to sink the same to the coal, for which purpose the plaintiffs had caused another oblique bore-hole to be bored near to the first-mentioned perpendicular hole; but when the boring-rods reached to the place where coal should have been, the defendants, to prevent the plaintiffs from drawing the rods, and in order to deprive the plaintiffs of the use thereof, in sinking the pit deeper, fastened the end of the lowest rods used in boring the last-mentioned oblique hole with an iron fork or key, or other instrument or means, in the hollow works made by the defendants under the pit so sinking by the plaintiffs in their close, and had actually prevented the plaintiffs and their workmen from drawing the boring-rods upward, although a very considerable force had been applied for that purpose, and the boring-rods still remained, and were kept fastened by the defendants in the hole, whereby the rods were wholly lost, and rendered useless to the plaintiffs, and the plaintiffs could therefore no longer work in or sink the pit as they had intended by the usual and ordinary means pursued by them; and the defendants and their workmen had very lately put and placed several wooden machines, inventions or contrivances, called framed dams, in the hollow works leading out of their coal mines to the colliery and mine, under the plaintiffs' close, or communicating therewith, by means wherefore the water was dammed or blocked up, so far as the said inventions were capable of doing. And the defendants absolutely refused to pull down the walls, framed dams and barriers, and to permit the water to run as it did before; that in order to deter the plaintiffs from proceeding further in sinking the pit, J. Fletcher, the younger, the son of the defendant Fletcher, had given notice to the deponent, who was then employed by the plaintiffs in sinking the pit, that the defendants' framed dams were then closed, and that whoever should be at the bottom of the plaintiffs' pit would be in danger of being blown up, and that he came to give notice of the danger; that if care was not taken they must abide by the consequence after such notice; that by stopping the water from running off, the plaintiffs had been hindered a very long time, and been put to a very great additional expense in endeavoring to sink their pit to the bottom, and that

the water intended to have been stopped by the framed dams rendered such pit in a great measure useless, by means of the water standing at the bottom thereof, in the hollow works made by the defendants under the plaintiffs' close; that the plaintiffs, if the pit had been sunk to the bottom, could not win the residue of their colliery adjoining on account of the coal being laden with water, so stopped by the said framed dams; and the defendants not only threatened, but actually continued and refused to move the same, and threatened that they would wholly prevent the plaintiffs from working their colliery, and were endeavoring to make the framed dams so tight by wedging as to drive the whole of the water back into the plaintiffs' colliery; and they also threatened and intended to prevent the plaintiffs from working the coals under their close called Flowered Moss, or whereby the plaintiffs might be enabled to convert the coals under their Flowered Moss close aforesaid, to their own use. And in conformity with the declaration of the defendant Steel, the defendants had endeavored and were using and daily pursuing every means in their power to deprive the plaintiffs from deriving any benefit from their colliery, or from any means of discovering the extent of the injury done to the plaintiffs by the proceedings of the defendants and their workmen.

The bill was filed in 1804, praying that the defendants, their servants and workmen, might be restrained by the injunction of the court from digging or getting any coals from under the plaintiffs' close, or in any manner digging under the same; and might be ordered to pull down the walls, dams or barriers which they had erected in their workings, whereby the water was prevented from flowing from the coals and colliery under the Flowered Moss close as it did before; and that the workings of the defendant might be restored to the same state and condition as the same were in before the walls, dams or barriers were made; and that the defendants, their servants and workmen, might be restrained by injunction from making any such erections or stopping up their works, or otherwise preventing the water from flowing from the beds and veins of coal, and other beds and veins under the said close; and that proper persons to be appointed by the plaintiffs might be allowed, on reasonable notice being given for that purpose to

the defendants, to inspect the workings of the defendants under the close called Seggs close, or under or near to the close called Flowered Moss close.

On the 14th of December, 1804, a motion was made to the effect of the prayer of the bill; upon hearing which it was ordered, "That an injunction should be awarded against the defendants, to restrain them, their servants, workmen and agents, from digging or getting any coals from under the plaintiffs' close in the pleadings mentioned, called Flowered Moss close, or in any manner digging under the same, until the defendants should fully answer the plaintiffs' bill, and this court should make another order to the contrary; and the defendants were to be at liberty to view or inspect the plaintiffs' Agill pit, Walker pit and the pit in the plaintiffs' said close, called the Flowered Moss, in the division of the defendants' lands, on giving a fortnight's notice in writing to the plaintiffs or one of them, with the name and description of the person to view and inspect on the defendants' part. And it was ordered, that the plaintiffs should be also at liberty to view and inspect the defendants' pit mentioned in the pleadings, on giving the like notice in writing to the defendants, or one of them, with the name and description of the person to view and inspect on the part of the plaintiff. And it was ordered, that the defendant should remove the framed dams or barriers in their works as the viewers should direct, who were to cause the same to be removed unless they should be of opinion that the colliery would be thereby destroyed. And it was ordered that the viewers or inspectors should be at liberty to replace such frames, dams or barriers, if they should think proper, without prejudice to any application the plaintiffs might thereafter make to remove them. And it was ordered that no alterations should be made by the plaintiffs or defendants in their respective works till after the first view or inspection, but so as not to prevent the regular working of their respective collieries or mines. And the plaintiffs were to be at liberty to attend each view or inspection of the defendant, with a viewer or inspector on their part; and the defendants were to have the same liberty of attending with a viewer or inspector each view or inspection of the plaintiffs. And it was ordered, that all views or inspections subsequent to the first,

by either the plaintiffs or defendants, be, on giving a like notice in writing, with the name and description of the person to view or inspect on their parts respectively."

BLAKESLEY V. WHIELDON.

(1 Hare, 176. High Court of Chancery, 1841.)

Right to inspect, a usual covenant in a lease or sale by installments.

In a contract for the sale of the minerals under a given surface at a certain price, payable in installments as the mining progressed, the vendor impliedly reserves the power of entering and inspecting the mines to ascertain the quantity of minerals from time to time gotten therefrom, and the vendor is entitled to specific performance of the contract with a covenant reserving such power in the conveyance.

The plaintiff and the defendant entered into a contract in the following terms:

"Memorandum of an agreement made this 6th day of April, 1838, between Charles Blakesley, of, etc., of the one part, and George Whieldon, of, etc., of the other part, as follows, namely, the said Charles Blakesley agrees to sell, and the said George Whieldon agrees to purchase, all the coal mines and minerals lying under two fields, situated in the parish of Exhall, in the county of Warwick, (description and boundaries), and which contain twelve acres, at or for the price of £350 per acre, with full power for the said George Whieldon, his servants and workmen, to enter upon the surface, and to search for, dig, bore, sink and use every other means necessary for getting, raising, and selling the said mines and minerals, paying all reasonable compensation to the occupier of the said two fields for any damage that may be done to the surface thereof by such digging, boring, sinking, etc. And it is hereby further agreed, by and between the said parties hereto, that the said George Whieldon shall pay down, on the execution of the conveyance, the sum of £350, being the price of one acre of the said mines and minerals; and the like sum of

£350, at the least, at the end of every succeeding year, till the whole of the said twelve acres of mines and minerals shall be paid for, whether the quantity of one acre shall be got and raised in each year or not; and that, if more than one acre thereof shall be got and raised in any one year, then an additional sum shall be paid for such excess, in the same proportion of £350 per acre; and if the said two fields do not contain so much surface measure as twelve acres, then the deficiency is to be made up from the next adjoining field or fields; and, lastly, it is agreed that the said Charles Blakesley shall, at his own expense, make out a good title to the said mines and minerals, and deliver an abstract thereof to the said George Whieldon as soon as may be; and that the said George Whieldon shall pay for the conveyance of the said mines and minerals.

(Signed) CHARLES BLAKESLEY,
GEORGE WHIELDON."

Differences subsequently arose between the parties in settling the draft of the deed by which the contract was to be carried into effect, and these were ultimately reduced to one question, namely, whether the plaintiff should have power to go down into any of the mines of the defendant, which might be necessary, for inspecting the working of the mines comprised in the contract, or whether the power, if granted, should not be confined to the mere reservation of a right to descend any pits or shafts sunk on the land over the demised mines. The defendant declined to execute a deed giving the plaintiff any power to descend, for the purpose of inspection, any pits or shafts not upon the land over the mines, which he had contracted to purchase from the plaintiff.

The bill was filed in March, 1839, and stated that the defendant was owner of certain mines contiguous to the mines contracted to be purchased by him from the plaintiff, and he intended not to sink any pit or shaft on the land over the mines contracted to be purchased from the plaintiff, but to work the same by means of the pits or shafts by which he worked the other mines; that, in working his said mines, the defendant had worked over the boundary of the plaintiff's mines and had got coal from them, and thus entered into possession, but had paid no part of the purchase money.

The bill prayed that the agreement might be specifically performed, and that it might be declared that the plaintiff and his agents ought to have a reasonable right of entry into the mines during such times as any part of the purchase money should remain unpaid, and that it might be referred to the master to settle the draft of the deed of conveyance and covenants to be executed by the plaintiff and the defendant for carrying the agreement into effect.

The defendant, by his answer, admitted the agreement, and that he had since worked the mines thereby contracted to be purchased. The defendant also said that he was very conversant with the working of coals and other minerals, and he believed that, in leases of minerals, or in sales of minerals, to be paid for by a royalty, according to the quantity of coals or minerals raised and gotten from or out of the lands and hereditaments so demised or sold, it was usual to insert powers authorizing the landlord or vendor, as the case might be, to enter and inspect the workings for such coals and minerals, in order to see that no waste was committed, and that the said coals and other minerals were worked in a proper and workmanlike manner; but that in the purchase of minerals by surface measure, no such power was, in ordinary cases, given to the vendor.

Several witnesses, mining agents and others, examined on behalf of the plaintiff, deposed that it was agreeable to the usage and custom of the mining districts in that part of the county of Warwick, as between the seller and purchaser of mines, in cases where the time and mode of the payment of the consideration money depended on the manner of working the minerals, and the extent to which the same were worked in each year, that a power of entering into the mines, for the purpose of viewing the same, should be reserved to the seller. On behalf of the defendant, several witnesses deposed that, in leases and sales of mines by royalty, the lessor or vendor usually reserved a power for a mine agent to go down to inspect the work, and see that the mines were properly worked; but in a sale of mines by surface measure, they never knew such a power reserved to the vendor.

Mr. SHARPE, and Mr. JAMES PARKER, for the plaintiff.

Mr. BOTELEB and Mr. COCKERELL, for the defendant.

The title of the plaintiff to require the introduction into the deed of the covenant in question, was argued, first, upon the ground of whether it was a reasonable and necessary covenant for the protection of the interest which the vendor had under the deed; secondly, upon the evidence of custom; and thirdly, upon the conduct of the parties.

To the third ground, as it formed no element in the judgment, it has been thought necessary to refer in the statement of the case.

VICE-CHANCELLOR:

I abstained from giving a final judgment in this case at the close of the argument, from the desire of referring, before I did so, to the cases that illustrate the principle by which my present decision must be governed in order that it might distinctly appear to what extent the judgment I should pronounce depended upon general principles, and to what extent it depended on the evidence given in this cause.

The general principle of law, that, where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute: *Pomfret v. Ricraft*, 1 Saund. 321, and notes. And this principle is carried to the extent that the implied grant entitles the lessee to whatever is necessary to the full enjoyment of the subject of the grant: *Senhouse v. Christian*, 1 T. R. 560. In determining what are usual and proper covenants in a case like that before me, regard must be had to the principle I have referred to; for the reasoning which would apply to a grant must, in principle, apply to a case like the present, so far as relates to the right of the parties to have preserved to them, not only the interest, but the means of protecting the interest which they are to take. Further than that I do not consider I ought to go.

In *Henderson v. Hay*, 3 Bro. C. C. 632, the question was whether, under an agreement to grant a lease upon common and usual covenants, the lessor was entitled to a covenant from the lessee not to assign without license. Lord Thurlow decided that the lessor was not so entitled, upon the ground

that common and usual covenants could only be understood to mean covenants "incidental to the lease." By the term "incidental to the lease," I understand Lord Thurlow to mean such covenants as were necessary to protect a leasehold interest, without affecting its legal incidents, and no other covenants. Considerable doubt appears to have been thrown upon this decision by the case of *Morgan v. Slaughter*, 1 Esp. 8, and the case of *Folkingham v. Croft*, 3 Anst. 700. But in the subsequent case of *Church v. Brown*, 15 Ves. 258, Lord Eldon, after great consideration, upheld Lord Thurlow's decision in *Henderson v. Hay*, and decided that it made no difference whether the agreement declared that the lease contracted for was to contain the usual and proper covenants or not; that, in every agreement, whether as to freehold or leasehold estate, it was implied that there were to be usual and proper covenants; that both lessor and lessee would be entitled to such covenants as were strictly incidental to the subject of the agreement, and to no others. Speaking of a covenant to sell a fee-simple estate, free from incumbrances, he says: "It is clear that covenant carries *in gremio*, and in the bosom of it, the right to proper covenants;" and he explains the reason to be, that at all times, such covenants have been carried into execution in a particular manner; and he afterward extends the reasoning to other cases upon the same principle. In case of an agreement for a lease, with a stipulation that the lessee should keep the premises in repair, a right of entry was uniformly reserved to the landlord, as a right incidental to the interest reserved to him by the agreement. Covenants become usual and proper covenants only because, by common consent, they are found essential to perfect the contract between the parties.

To apply this reasoning to the present case—it is proved in evidence that where coal mines are either let or sold at a royalty, with stipulations as to the manner of working the mines a right of entry to view the mines is reserved to the lessors, for the twofold purpose of seeing—first, in what manner the mines are worked; and, secondly, the quantity of minerals obtained. A covenant or proviso for this purpose is admitted to be incidental to the contract for such a lease or sale. The contract, without any express stipulation would, in Lord El-

don's language, carry *in gremio*, and in the bosom of it, the right of entry, which was necessary to protect the interest of the lessor or vendor. How does the present case differ from that? It differs from it in this respect only, that the lessor having no interest in the manner of working the mines, but having an interest in the quantity of minerals worked, a question may arise, whether the right of entry to which he would be entitled, if his interest extended to both, must not be reduced to such right of entry as will suffice to protect the single interest which he has; but his right to the incidental covenants as to that interest must remain. In the absence of any evidence but that to which I have referred, and which the answer of Mr. Whieldon confesses, I should think that the conclusion I have stated was irresistible.

The case does not, however, rest upon any conclusion merely so derived. The issue distinctly tendered in the cause by the plaintiff was, that the power of inspection was a usual reservation in cases like the present. Witnesses have been examined on this point by both parties, and the evidence of the witnesses for the plaintiff—scarcely more forcible than that of the defendant's witnesses—inevitably leads to the same conclusion. In fact, all the evidence proves it. There must, therefore, be a decree for a specific performance of the agreement, giving the plaintiff such a power of entry and inspection as will enable him to protect his interest in the property, but not extending beyond what may be necessary for that purpose.

MINUTE OF DECREE.--The agreement of the 6th of April, 1838, to be specifically performed. The defendant admitting that he has accepted the title, and the plaintiff waiving all claim to interest upon the installments of purchase money remaining unpaid, refer it to the master to settle the conveyance for carrying the agreement into effect, in case the parties differ; and in settling such conveyance, the master is to insert therein a clause empowering the plaintiff and his agents, at all reasonable times, and upon reasonable notice, to enter the mines in the pleadings mentioned, and to inspect and measure the same, so far as from time to time may be necessary, for the sole purpose of ascertaining whether the quantity of minerals, which should or may be gotten or worked in each year, has exceeded, and how much, if anything, an acre, until the whole quantity of coal under the said twelve acres shall be gotten or worked, or the whole of the twelve installments mentioned in the pleadings shall be paid; and in settling the said conveyance, the master is to have regard to the clauses usually contained in

leases and sales of coal at a royalty. Liberty to the master to state special circumstances. Costs to be reserved. The parties to be at liberty to apply.

LEWIS V. MARSH.

(8 Hare, 97. High Court of Chancery, 1849.)

¹ **Inspection through shaft on foreign ground.** A coal lease limited the right of lessee to mine within a certain distance of buildings. The lease did not reserve a right of inspection and the mine was worked through a shaft on other land of the lessee without any openings on its own surface: *Held*, on bill to restrain the working of the reserved ground, that lessors should have leave to inspect and to enter through the defendant's shaft on defendant's ground, for that purpose.

Objectionable individuals excluded as viewers.

A bill by the lessors of a colliery against the lessees for an account of the workings of certain portion of the coal by the defendants, and to restrain the working in certain parts of the mine reserved by the lease. The defendants were entitled by the lease to work the coal, subject to a certain rent per ton, under an area of about 160 acres with an exception of the coal lying under and within thirty feet of certain buildings. It was admitted by the answer that the defendants had worked some of the excepted coal. There was no provision for inspection in the lease, and the defendants had worked the coal through a shaft in an adjoining mine belonging to themselves, so that the demised mine could only be entered through the defendants' mine.

The SOLICITOR GENERAL and Mr. W. M. JAMES, for the plaintiffs, moved that the defendants might be ordered to permit the plaintiffs, and certain persons mentioned in the notice of motion, all or any of them, with workmen and other necessary assistants, at all reasonable times, and from time to time, to have access to the coal works of the plaintiffs in and through the adjoining coal works of the defendants, to

¹ *Stockbridge Co. v. Cone Works*, 6 M. R. 317; *Whalley v. Ramage*, 8 M. R. 52.

inspect and examine the said coal works, the property of the plaintiffs, and to ascertain the real extent, state and condition thereof, and the real weight of the coal from time to time worked by the defendants therefrom.

They submitted that the plaintiffs ought not to be left to read the admission from the answer, coupled as it was with other statements; but were entitled to the means of proving the fact that the defendants had worked beyond their boundary.

They cited *Kynaston v. East India Company*, 3 Swanst. 248; S. C. on appeal, 3 Bligh, 153; *Earl of Lonsdale v. Curwen*, 3 Bligh 168, n.; and *Walker v. Fletcher*, Id. 172, n.

Mr. WOOD and Mr. WHITEBREAD, for the defendants, opposed the motion. The plaintiffs might, if they had desired any such power of inspection, have reserved it in their lease; but they had made no such contract: *Blakesley v. Whieldon*, 1 Hare, 176. Nor had they, as in *Kynaston's case*, shown any necessity for the inspection. The present motion asked more than had been conceded in any of the cases referred to; for the plaintiffs sought not only to inspect the demised coal works, but also to pass, for that purpose, into and through the property of the defendants. No implied contract gave the plaintiffs such a right. Admitting that a power of inspecting their own mine might be impliedly reserved, it must be exercised in a lawful way, at their own expense. The plaintiffs might open a shaft and descend into the mine, upon their own property; that must be the extent of their legal right under the contract.

VICE CHANCELLOR.

I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party can not get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do. If there had been a shaft going through the plaintiffs' land there would not be the

slightest doubt as to the plaintiffs' right to go down and inspect the works.

The object of allowing supports to remain is to prevent the ground from sinking, by which not only the surface, but sometimes roads and buildings are damaged; and to prevent that, provision is commonly made that certain supports shall be left. If adequate supports are not left, irreparable mischief will probably follow, and the parties endangered in such a case must be allowed to come the moment the supports are about to be taken away. If the parties do not make any stipulation as to what the size of the supports shall be, a question of difficulty may often arise; but when they stipulate, as I understand is the case here, that supports, co-extensive with the mass of buildings, or of a certain admeasurement, shall be left, the difficulty is obviated.

It appears to me that this is a case as well of necessity as of irreparable mischief. I can not think that in this case the court is required to direct the preliminary reference which was considered proper in the case of *Kynaston v. The East India Company*, 3 Swan. 255. It was there a question whether it was necessary to examine the warehouses internally in order to get at the full amount. I do not conceive that the court would go into that question when the implied contract between the parties would give the right of inspection. It appears that the court has once allowed the inspection to take place before the hearing.

Mr. Wood interposed a difficulty, which I confess presses me more in a moral view of the case than in its legal bearings—that you must go through the workings in the mine of the defendants. I can not, however, think the defendants, by choosing to work their colliery in a way which gives the plaintiffs no access except through the property of the defendants, to their own property, which they have a right to examine, can afterward be allowed to urge their own act—an act done for their own convenience and benefit—as an objection to the inspection which the plaintiffs would otherwise have obtained.

The defendants, objecting to the admission into their mine of certain of the persons mentioned in the notice of motion,

the plaintiffs consented to withdraw the names of the persons objected to.

MINUTE OF DECREE.—This court doth order that at all reasonable times, until the publication shall pass in this cause, the plaintiffs be at liberty, upon giving reasonable notice, to view the plaintiffs' mine in, etc., and the workings of the defendants therein; and it is ordered that such persons as the plaintiffs shall appoint be at liberty also to view the said mine and workings, on giving a fortnight's notice in writing to the defendants of the names and descriptions of the persons so to be appointed to view and inspect the same on the part of the plaintiffs (the plaintiffs by their counsel undertaking not to appoint I. T., etc., for such purpose), and it is ordered that the defendants do permit the said plaintiffs and the persons so to be appointed (other than the said I. T., etc.) to have access to, and to view and inspect the said mine and workings; but this order is not to entitle the plaintiffs to view or inspect any part of the defendants' mine except for the purpose of ascertaining the boundary of the plaintiffs' mine.

BENNETT V. WHITEHOUSE.

(28 Beavan, 119. The Rolls Court, 1860.)

Inspection of colliery working across bounds. The owner of a mine sought relief against the owner of an adjoining mine for an alleged trespass in working into the plaintiff's mine: *Held*, that the plaintiff upon making out a *prima facie* case was entitled to an interlocutory order for an inspection of defendant's mine; that the denial by the defendant of the trespass was not a sufficient ground for refusing the order, and that it did not depend upon the balance of testimony.

¹ The court requires the best evidence of facts, and if that evidence is only to be obtained by inspection, an inspection will be allowed.

The plaintiff and defendant were lessees of adjoining coal mines. The plaintiff, having some reason to suspect that the defendant was working from his own mine into the plaintiff's mine and taking coal therefrom, applied to the defendant to permit him to go down the pits into the defendant's colliery, to inspect the working. The defendant denied altogether that he was working into the plaintiff's colliery, and refused the permission.

¹ *Whaley v. Brancker*, 8 M. R. 29.
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The plaintiff instituted this suit against the defendant, praying an account of the coal raised by the defendant out of the plaintiff's colliery; for payment of the value; for an injunction to restrain further trespass, and for an inspection of the workings of the defendant's colliery.

A motion was now made for an inspection, and the state of the evidence was as follows:

The plaintiff swore to his belief and conviction that the defendant was working into his colliery, and said that he was unable to ascertain the fact, unless permitted to inspect the mine. This was supported by Skidmore, formerly a workman at the defendant's colliery, but who had been discharged, as he said, because he was supposed to have given information to the plaintiff as to the defendant's workings; he was now working for the plaintiff. He stated that the prevalent impression amongst the colliers employed in the defendant's pit was, that they were working the coal in the plaintiff's colliery, and that he believed the defendant's workings were, to a considerable extent, under the plaintiff's land.

The defendant, by his answer, altogether denied that he had worked into the plaintiff's mine, and his witnesses stated that it was impossible for a man, at a distance of ten yards from the bottom of a shaft to say in what direction he was working or going.

Mr. WICKENS, in support of the motion.

The point in dispute can only be settled by an inspection. If the defendant should turn out to be right, no injury will have been done to him, but if, on the contrary, the plaintiff is right, there will be a denial of justice by refusing an inspection. He relied on *The East India Company v. Kynaston*, 3 Bligh (O. S.), 153; *The Attorney-General v. Chambers*, 12 Beav. 159; *Kynaston v. The East India Company*, 3 Swanst. 248.

Mr. BAGSHAWE and Mr. MORRIS, *contra*.

The plaintiff is bound to make out some case of trespass

to entitle him to an examination of the defendant's mine. There is nothing in this case but belief on the part of the plaintiff that there has been a trespass, and this is positively denied by the defendant.

The plaintiff and defendant are rival traders and miners, and the object of the plaintiff is merely to ascertain the nature of the defendant's workings, the depth and thickness of the different strata, and the mode of the defendant's working, in order that he may avail himself, in the adjoining mine, of the outlay and experience of the defendant. This is not a legitimate object, and the plaintiff has no right, on mere conjecture, to force the defendant to discover these matters; again there is no distinct evidence that the plaintiff can not, from his own colliery, ascertain whether there has been any trespass.

In *The East India Company v. Kynaston*, the right to the tithes was admitted and the only question was the amount. In *The Attorney-General v. Chambers* it does not appear that there was any denial of the trespass, but the question was as to the extent. In *Lewis v. Marsh*, 8 Hare, 97, "it was admitted by the answer that the defendant had worked some of the excepted coal."

But here there is a positive denial.

THE MASTER OF THE ROLLS.

It is established by the cases, that if a person is making use of his property to the injury of the property of his neighbor, the latter is entitled to an inspection in order to ascertain the extent of the injury, and this court only requires him to show a *prima facie* case; and the mere contradiction of the defendant amounts to nothing, unless he shows positively that no injury has been done to him. There must, in the absence of contract, be a *prima facie* case, showing a reasonable ground for the belief that an injury is committed. If it were a question depending only on the balance of testimony, I should, in this case, be in favor of the defendant. But the court requires the best evidence of the fact, and the best evidence here is by an examination of the workings in the defendant's mine.

Suppose a man had a right to the surface, and that another person was entitled to the minerals—if the latter insisted that the former had sunk a shaft, and was abstracting his minerals, would not this court allow an inspection, in order that the fact in dispute might be ascertained? I have acted upon that principle in *Adshead v. Needham*, in which I allowed the plaintiff to go through a gallery in the defendant's mine in order to inspect it.

The way in which Lord Redesdale puts it is this he says, "In Lord Lonsdale's case, the order was made before the decree, and upon a question where the rights of the parties were uncertain. It might have turned out, after the order of inspection in that case, that the plaintiff had no right; but in this case his right is ascertained. The only difference (which is immaterial) is, that in that case it was a mine, in this a house; but both are equally private property.

In that case, the result of the inspection was a discovery, that coal to the amount of £3,000 had been taken away from Lord Lonsdale." Wherever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted, still, as the only way of ascertaining the fact is by an inspection, the court always allows it, if it can be done without injury to the defendant. I am of opinion that the plaintiff is entitled to an inspection, but it must be at his own expense, and on giving the defendant reasonable notice.

The plaintiff must have an order to inspect, at all reasonable times, upon giving one day's notice, so far as may be necessary to ascertain whether the defendant has worked into the plaintiff's land, and how far and to what extent, with liberty to measure, dial and make all such plans or surveys as may be necessary for that purpose, and to use the defendant's machinery for descending and ascending, doing no injury to the defendant's works, and paying the defendant any expenses which he may incur.

BENNETT V. GRIFFITHS ET AL.

(30 L. J., Q. B. 98. Court of Queen's Bench, 1861.)

Ancillary power to remove obstructions. Plaintiff, the owner of a mine adjacent to a mine worked by the defendants, believing that defendants had worked beyond the boundary, applied to them for leave to inspect their workings. After some delay permission was granted, when at the boundary between the plaintiff's and defendants' minerals, a newly erected wall was found which stopped further inspection. This wall the defendant refused to allow to be interfered with. On application to a judge at chambers an order was made for the government inspector to examine the wall and report on the practicability of an inspection behind it, and he reported that it could be done, whereupon the judge made an order that plaintiff, by his witnesses, workmen and agents, should be at liberty to inspect the defendants' mine at and behind the wall on certain terms: *Held*, that under Sec. 58 of the Com. Law Procedure, Act of 1855, giving to courts of law the power to order inspection, there was as ancillary thereto the power to order the removal of obstructions. **Security required before granting the order for inspection, by bond or deposit.**

This was a motion for a rule calling upon the plaintiff to show cause why an order of BLACKBURN, J., for the inspection of a mine of the defendants should not be set aside.

It appeared from the affidavits that the plaintiff was the owner of certain coal mines, situate at Titford, near Oldbury, in the county of Worcester, containing an area of forty acres or thereabouts. The defendants were the lessees and occupiers of other mines adjoining to the said mines of the plaintiff, and which the defendants were engaged in working at the time the said order was made. The plaintiff, having cause to believe that the defendants had encroached upon his mine, applied to them, on the 2d of October, for permission to make an inspection of their mines. On the 26th of October, a mine agent, employed for the purpose by the plaintiff, was allowed to go down into the mine, when he found that the defendants were working and getting a measure called the "thick coal." He made his survey from the pit shaft along a gate road, to the boundary of the plaintiff's mine,

and at the boundary he found a recently erected wall or building, which, according to his affidavit, divided the mines of the plaintiff from the mines of the defendants, and extended thirty yards or thereabouts. Application was made to the defendants to allow the wall to be taken down, in order that the plaintiff's agent might see whether or not any encroachment had been made beyond it; but the defendants refused to allow that to be done. There were no means by which it could be ascertained whether such an encroachment had taken place, except by taking down a portion of the wall and driving a gate road through it, or by making a road from the plaintiff's own mines, at an expense of about £1,000. The time occupied in the latter process would be about six months. The plaintiff had reason to believe that about 1,000 square yards of his coal had been taken away by the defendants. On the part of the defendants, it was sworn that it would be injurious to their mines if a gate road was driven through the wall; that the wall which had been erected was only the usual and proper wall, erected for the purpose of strengthening the gate road in that portion of the mine; and that the workings had been confined to the getting of coal within their own boundaries. A summons had previously been obtained for an inspection of the defendant's mines; and, under the state of things above set out, BLACKBURN, J., ordered that that summons should be adjourned for a week, "to procure a report from the inspector of mines as to the practicability—especially with reference to the safety of the mine—of making an inspection behind the wall mentioned in the affidavit," the plaintiff undertaking to abide by any order the court might make as to paying expense or loss incurred during his inspection.

In obedience to this order, the inspector of mines for the district was allowed to go down into the defendants' mines on the 13th of November; but he was unable to make a satisfactory examination, in consequence of the "damp" in the mine. The defendants refused to allow any person employed by the plaintiff to go into the mine with the inspector, although the latter assured them that his inspection would not be satisfactory unless that was done.

An order was, on the 16th of November, made by BLACKBURN, J., further adjourning the summons, and ordering that the defendants should give to the inspector all such facilities as he should require, including permission for such persons as he should think fit to accompany him for the purpose of the inspection.

On the 20th of November the said inspector made his report, to the effect that an inspection could be made behind the wall either by making a headway in the solid coal, near the wall, or by removing a portion of the wall itself, which consisted chiefly of short, round timber, longitudinally packed; that a portion of the return air-current from the workings might be diverted, and safely used by the plaintiff for the purpose of ventilating such workings as might be deemed expedient for such inspection. He further reported that no practical difficulty existed calculated to endanger the lives of the workmen employed; and that the inspection sought by the plaintiff was not likely to prove detrimental to the present or future workings of the mine, beyond a temporary suspension of the works of the defendants.

An order was then made by BLACKBURN, J., "that the plaintiff be at liberty, by his witnesses, workmen and agents, to inspect the defendants' mine, at and behind the wall, in the affidavits and the inspector's report mentioned; that for this purpose the defendants give all reasonable facilities for access to and in the mine, and for ventilation during the process; and that the plaintiff be at liberty, so far as is necessary for the purpose of the inspection, to make a driftway, as described in the inspector's report. That before commencing the inspection, the plaintiff give security to the satisfaction of the master, to the extent of £500, or deposit that sum with the master, to abide any order the court may make as to indemnifying the defendants for any loss or damage which may be sustained in consequence of this inspection."

The rule was moved for, Nov. 26, 1860, by GRAY, on behalf of the defendants. It is not intended to dispute the propriety of the order which has been made by the learned judge, for probably the affidavits disclose sufficient ground for making such an order, if there is any power of doing so. But the

defendants contend that there is no such power. Section 58 of the Common Law Procedure Act, 1854, enacts as follows: "Either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge if they or he think fit to make such rule or order, upon such terms as to costs and otherwise as such court or judge may direct," etc.

(BLACKBURN, J.—I thought that as I had authority to order that an inspection should be had, I was also entitled to order that the plaintiff might do all that was ancillary to such inspection.)

It is not necessary to discuss the question whether a court of equity would grant it or not, for there is no reference in the section to the practice of such courts, as there is in the 14 and 15 Vict. c. 99, s. 6. The only word used in section 58 is "Inspection."

(COCKBURN, C. J.—But that word may have acquired a meaning in the courts of equity. HILL, J.—The wall was built under circumstances which lead strongly to the conclusion that it was done intentionally to prevent an inspection. Can it be contended that the court is powerless to say that this inspection should take place in spite of the wall being placed there?)

Yes, that is the contention of the defendants, for there are no words in the section giving a judge power to order that the works of the defendants should be destroyed. A very similar point arose in *The Patent Type-Founding Company, Limited, v. Lloyd*, 29 Law J. Rep., N. S., Exch. 207, where the court of exchequer refused to order the defendant, who was the publisher of a newspaper, to give up some of his type for the purpose of being analyzed by the plaintiff. The grounds of that refusal apply here; and no one can tell how far the court would be obliged to go if they held that the learned judge had power to make this order.

(BLACKBURN, J.—The case which you cite arose under the

15 & 16 Vict. c. 83, s. 43, the words of which are not the same as in section 58.)

If the legislature had intended to give such power, some further words would have been used.

The court having granted a rule *nisi*—

MACNAMARA showed cause in the first instance.—It can not be doubted that the judge had power to order an inspection of the mines in order to find out whether or not there had been an encroachment upon the plaintiff's mines. That being so, it follows that he had power, under the circumstances, to order that the wall should be taken down, for otherwise it was impossible to get at the part alleged to be encroached upon without an unreasonable waste of time and money. Again, no harm is done to the defendants, for all proper precaution is taken to secure them against loss. What was intended by the legislature was a full and complete inspection, and such an inspection can not be had without pulling the wall down in part. Such a step is in accordance with the maxim that where anything is given by the law, that is also given which is necessary to the enjoyment of it. In fact, unless the order is made there will be a denial of justice. In *The Patent Type-Founding Company, Limited, v. Lloyd*, the court, no doubt, refused to order that some of the type should be broken up, but that was because an inspection could be had by looking at it; and Bramwell, B., said, "If it is an article the nature of which can not be ascertained by the eye, or other external examination, some other mode of ascertaining it must be resorted to." The court would in that case have made the order if it could have been shown to be necessary. Suppose a judge made an order for the inspection of a house, surely he could also order that the door should be opened.

(BLACKBURN, J.—In *The Attorney-General v. Chambers*, 12 Beav. 159, the master of the rolls made an order that the commissioners of woods and forests should have liberty to enter and inspect the coal mines of the defendant, and to take all necessary steps for enabling them to make and perfect a complete survey.)

This proceeding is necessary to the inspection of the mines. GRAY replied.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court.

In this case the plaintiff, who is owner of minerals adjacent to a mine worked by the defendants, having reason for believing that the defendants had worked across the boundary and removed his coal, applied to them, on the 2d of October, for leave to inspect their workings, and ascertain if such was the fact. The agent of the defendants put off the inspection from time to time till the 26th of October, when he permitted the plaintiff's agent to descend into the mines and inspect them. The plaintiff's agent found the workings, as far as he could examine them, to be within the defendants' boundary; but at the boundary between the plaintiff's minerals and the defendants' he found a newly-erected wall, extending for about thirty yards. If there was any encroachment at all, it must have been behind this wall. The plaintiff applied to the defendants for leave to take down part of this wall, so as to ascertain if there was any encroachment behind it, and was refused. He then applied at chambers for an order, under the 58th section of the Common Law Procedure Act, 1854, to inspect the defendants' mine behind this wall, on affidavits showing a *prima facie* ground for believing that there had been an encroachment behind it. Affidavits were used in opposition, in which it was strongly sworn that any meddling with this wall would produce very injurious effects on the defendants' mine, and be attended with great danger to those engaged in working it, but containing nothing to raise any doubt that the wall had been recently erected, and that an inspection beyond it would decide at once whether there had been an encroachment or not. The judge at chambers (BLACKBURN, J.) made an order that the government inspector of mines should be permitted to examine this wall, and report on the practicability and safety of an inspection behind it. This order was at first baffled; but, on a second and more peremptory order to the same effect, the government inspector of mines did examine it, and reported that an inspection could be made behind the wall, by certain means, pointed out in the report, without any practical

difficltly or any danger either to the lives or health of the workmen employed in the said pits and workings, or with any likelihood of detriment to the present or future workings of the mine, beyond a temporary suspension of the works of the defendants for a few hours, or at most for a day. On this BLACKBURN, J., made an order "that the plaintiff, by his witnesses, workmen and agents, should be at liberty to inspect the defendants' mine at and behind the wall in the affidavits and inspector's report mentioned; that for this purpose the defendants should give all reasonable facilities for access to and in the mine, and for ventilation during the process; and that the plaintiff should be at liberty, so far as was necessary for the purpose of the inspection, to make a driftway as described in the inspector's report; that before commencing the inspection the plaintiff should give security to the satisfaction of the master to the extent of £500, or deposit that sum with the master, to abide any order the court might make as to indemnifying the defendants for any loss or damage which may be sustained in consequence of this inspection, and the plaintiff undertaking to fulfill any order in that respect made by the court."

On the last day of last term, Mr. Gray applied for a rule to set aside this order, against which cause was shown in the first instance. No objection was made to the propriety of the order, or the justice of the terms contained in it, if the judge had jurisdiction to make it; but it was contended that neither the court nor a judge had jurisdiction to interfere with the wall itself or the defendants' minerals, for the purpose of making an inspection behind the wall. As this was the first instance, as far as we know, in which any question as to the extent of this new jurisdiction in a court of common law had been raised, the court took time to consider.

We are of opinion that the judge had jurisdiction to make the order in question. The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that as ancillary to that power the courts of equity have ordered the removal, where necessary, of obstructions to the inspection. In the notes to *The East India Company v. Kynaston*, 3 Bligh, O. S., 153, 168, two cases are

referred to in which, under circumstances very similar to the present, such orders were made. In *The Earl of Lonsdale v. Curwen*, the defendant had worked his own mines so as, by the rubbish, etc., to obstruct the passages to the spot where the inspection was sought. An order was made that the viewers should inspect the mine, and that the defendant should remove the obstructions. In *Walker v. Fletcher* the defendants had, in working their own mines, either *bona fide* to keep out the water, or colorably to prevent the inspection, erected framed dams and barriers, the effect of which was to drown the part of the mine where it was alleged that the encroachment had taken place. The order made was, that the defendant should remove the framed dams or barriers as the viewers should direct, and that the viewers were to cause the same to be removed, unless they should be of opinion that the collieries would be thereby destroyed. This latter case, which was decided in the time of Lord Eldon, is a strong assertion of the power to remove obstructions to inspection, and seems to us to go far to support, in that respect, the order now complained of. In the recent case of *Ennor v. Barrell*, 6 Jur., N. S., 1233, the lords justices varied an order of Stuart, V. C., in which he had directed that the plaintiff should be at liberty to cut trenches in the defendant's ground in order to ascertain the geological formation of the ground there, as being too extensive; but no doubt was thereby thrown on the jurisdiction exercised in *The Earl of Lonsdale v. Curwen* or *Walker v. Fletcher*. The 58th section of the Common Law Procedure Act does not regulate the jurisdiction given to the courts of law by reference to that already exercised by the courts of equity; but we think, that as ancillary to the power of inspection given to the courts of common law, there is the same power given to remove obstructions with a view to inspection which was exercised by the courts of equity as ancillary to their power of ordering inspection. The order complained of does not, as it seems to us, go further than that made in *Walker v. Fletcher*.

This being our opinion, the rule must be discharged.

Rule discharged.

WHALEY V. BRANCKER.

(10 Law Times, N. S., 155. V. C. KINDERSLEY'S Equity Court, 1864.)

An adverse inspection will not be allowed until time given to defendants to answer the affidavits upon which it is based.

Where the court can not be satisfied as to the truth and materiality of a case, an inspection is a course constantly taken by the court, to do justice.

BAILEY, Q. C. (EDDIS with him), moved in this case for an injunction to restrain the defendants, their agents and workmen, from digging or carrying away any coal or other minerals from within or under the property of the plaintiffs at Pemberton in Lancashire, and from working into, damaging, or interfering with any of the plaintiffs' barriers. The plaintiffs and the defendants worked neighboring coal mines in the same vein of coal; and it was alleged on the part of the plaintiffs that the defendants were trenching upon the plaintiffs' barriers.

SPEED, for the defendants, asked for time to answer the affidavits; the defendants were willing to give an undertaking until the next seal in the terms of the notice of motion.

BAILEY, Q. C., then asked that there might be an inspection of the mines. He referred to *Bennitt v. Whitehouse*, 28 Beav. 119; 6 Jur., N. S., 528; *Lonsdale v. Curwen*, 3 Bli. 158.

Speed objected to an inspection, as it might be detrimental to the interests of the defendants. He also maintained that the court had no jurisdiction to make such an order in the present stage of the suit.

The vice-chancellor said that, assuming, what he had no doubt was the case, that the defendants were intending only to do what was right, it appeared *prima facie* to be as much for their benefit as for that of the plaintiffs that there should be an inspection. But it was not then a question whether it would be for their benefit or not; the question was, whether the court, at that stage of the suit, could order an inspection adversely. It appeared to him that it could not. The motion must therefore stand over on the undertaking which the defendants offered, to give time to answer the affidavits.

March 17. BAILEY, Q. C., and EDDIS now renewed their motion for an injunction, and also moved for an inspection. They cited, in addition to the cases above mentioned, *Lewis v. Marsh*, 8 Hare, 97; *Attorney-General v. Chambers*, 12 Beav. 159; *Lowndes v. Bettle*, 10 L. T. Rep. N. S. 55; *Ennor v. Barwell*, 1 DeG. F. & J. 130, and contended that the present was the stage of the suit at which the court could grant an inspection.

A plan of the underground works was produced, and an affidavit of Mr. Tyrer, a mine surveyor, was read, by which it appeared that the bill had been filed in consequence of Tyrer visiting the mines, as he had discovered that the defendants were working into the plaintiffs' barrier, the effect of which would be that the plaintiffs' mines would be flooded with water.

GLASSE, Q. C., and SPEED, for the defendants, said that the motion was *ex parte*, as the exhibits had been obtained at Manchester only two days previously. The defendants had affidavits ready which would displace the plaintiffs' case on the question of title, but there had been no time to file them. The parties were rival colliers, the defendants having superior machinery, and the object of the plaintiffs in asking for an inspection, was to view the mode of working, which the defendants were unwilling to disclose.

BAILEY, Q. C., in reply.

The VICE-CHANCELLOR.—In this case the affidavits of the plaintiffs show *prima facie* a right in the plaintiffs to their mines, and that the defendants are cutting into the barrier surrounding the plaintiffs' mine. Notice of motion was served a fortnight ago, and the defendants, on the last seal day, asked for further time to file affidavits, which was granted; but the affidavits have not yet been filed. There must be either an injunction or an *interim* order for an injunction. There is also the question, whether the plaintiffs ought to be at liberty to inspect the defendants' mines. The court must be made acquainted with the truth and materiality of the case, and it can only be satisfied of this, in a case like the present, by an

inspection, either by the plaintiffs or by competent persons employed by them; that is a course constantly taken to enable the court to do justice. The statement about the plaintiffs being rival colliers, and about their motives, is only a suggestion, although it is not impossible that it may be the fact, but unless there be something very special in these mines it can hardly be so, as there is generally no variety in machinery used in collieries. If it is only a question of title, and the defendants admit the working, will they submit to an injunction till the hearing or further order?

Glasse said they would admit the working, and would submit to an injunction till the hearing or further order.

Bailey said the injunction would be no protection without the order to inspect.

The VICE-CHANCELLOR.—If I had a plan before me showing clearly the present state of the workings and the defendants' counsel would admit that such plan was correct, I would not, as the defendants are willing to submit to the injunction till the hearing or further order, give leave to inspect, because I should then possess the requisite knowledge of what has been done; but that not being so, if the plaintiffs will undertake to answer any such damage as the court shall think fit to award by reason of granting the injunction, let there be an *interim* order in the terms of the notice of motion till the second day of sittings after the Easter vacation, and an order to inspect in the usual terms, the rest of the motion standing over till the first day of sittings after the Easter recess, with liberty to the defendants in the meantime on giving two days' notice, to bring on the motion and apply to discharge the order to view.

Solicitors: MILNE, SHARPE and PARKER.

THE COMMONWEALTH V. CONYNGHAM ET AL.

(66 Pennsylvania State, 99. Supreme Court, 1870.)

Time for appointing examiners—Construction of statute. The act of 1870, providing for the safety of mines, directed that upon the *passage* of the act examiners were to be appointed by the judges of the Common Pleas "at the first term of the court in each year." At the time of the passage of the act the first term for that court in Luzerne county had passed. *Held*, that the examiners were to be appointed at the first term of the current year happening after the passage of the act.

Terms and intent of the Safety Act stated and the statute construed so as to become definitely operative from the time of its passage.

Rule of construction. When a statute gives a power, what is necessary to make it effectual is given by implication.

May 21, 1870. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ.

This was an alternative mandamus, issued May 3, 1870, upon the information of F. Carroll Brewster, Esq., Attorney-General, against John N. Conyngham, President Judge, Edmund L. Dana, Additional Law Judge, and Thomas Collins and Isaac S. Osterhout, Associate Judges of the Court of Common Pleas of Luzerne county.

The information set out that by the 14th section of an act passed March 3, 1870 (Pamph. L. 3), it was provided that upon its "passage," the governor should, "upon the recommendation of a board of examiners selected for that purpose; composed of three reputable coal miners in practice, and two reputable mining engineers, to be appointed by the judges of the Court of Common Pleas of Luzerne county, all of whom shall be sworn to a faithful discharge of their duties, appoint three properly qualified persons to fill the offices of inspectors of coal-mines and collieries, for the counties of Luzerne and Carbon, whose commissions shall be for the term of five years or during good behavior." * * * "The examiners provided for in this act shall be appointed by the judges of the Court of Common Pleas for the county, at the first term of the court in each year, to hold their places during the year, and *vacancies shall be filled* by the court as they occur."

By the 15th section of the said act it was provided that "the term of office of the inspector of coal mines, appointed under an act for the better regulation and ventilation of mines, and for the protection of the lives of the miners in the county of Schuylkill, approved April 12th, one thousand eight hundred and sixty-nine, shall expire on the first day of June, Anno Domini one thousand eight hundred and seventy, *and in his room three inspectors* of mines for the counties of Schuylkill, Dauphin, Northumberland and Columbia, shall be appointed by examiners, to be appointed by the Court of Common Pleas of Schuylkill county, in the manner and form provided by the 14th section of this act."

That the respondents "have declined for the present to make the appointment of the board of examiners for said county, as required by the aforesaid sections of the act."

The respondents answered that they declined making the appointment, because the time had not arrived when the appointments could legally be made. The first term of the Luzerne Common Pleas for 1870 commenced on the first Monday of January, then last past; the second term, on the third Monday of February; the third term, on the first Monday of April; that the application for the appointment of examiners was made at the third term of the year 1870, and the respondents refused to appoint for defect of present power, as they believed, because the first term of the court for 1870 had passed, and they could not appoint till the first term of the next year.

The attorney-general demurred to the answer.

The ATTORNEY-GENERAL, for the Commonwealth.—Statutes take effect from their date, unless it be otherwise provided: *Bradlee v. Brownfield*, 2 W. & S. 279; *Jamieson v. Attorney-General*, 1 Alcock & Napier, 375; *Parker v. Attorney-General*, 6 Brown, P. C. 486. Wherever two parts of a statute are contradictory, the court endeavors to give a distinct interpretation to each of them by looking at the context: *Pretty v. Solly*, 26 Beav. 610; *Kerlin v. Bull*, 1 Dall. 178; *Dwarris on Stat.* 514, 517.

The opinion of the court was delivered, May 26, 1870, by THOMPSON, C. J.

The question presented in this case is single, and not difficult. The act of the General Assembly of the 3d of March, 1870, entitled "An act providing for the health and safety of persons employed in coal mines," provides for the appointment, by the governor, of three coal mine inspectors, for the counties of Luzerne and Carbon, upon the recommendation of a board of examiners to be appointed by the Court of Common Pleas of Luzerne county. The 14th section of the act provides for these appointments to be made by the governor "upon the passage of this act," but only upon the recommendation of the board of examiners. The examiners must be appointed by the court before they can recommend persons for appointment as inspectors. The difficulty in the minds of the respondents, the judges of the Common Pleas of Luzerne county, lies in the following provision contained in the section. It says, "the examiners provided for in this act shall be appointed by the judges at the *first term* of the court in each year," and as the act did not pass until after the first term of the court in Luzerne county had passed, they were of opinion that they had no power to appoint until the first term of the court in 1871, and they therefore declined to appoint.

This construction would defeat what seems to have been the manifest intention of the legislature in passing the act; namely, that it should go into operation immediately upon its passage. This very clearly appears in various provisions of the act. In the 14th section the governor is required "upon the passage of the act," subject of course to the time which may be required for the preliminary action of the board of examiners, to appoint the inspectors provided for in the act. This does not consist with the idea of waiting until another year to enable the court to appoint examiners at the first term. In the 4th section there is a provision requiring action by the inspectors in superintending the construction or sinking of slopes or outlets in mines requiring them, which are to be constructed within four months after the passage of the act, on penalty of inability to the owners to employ miners and

workmen unless in certain contingencies mentioned. This shows that it was designed that inspectors should be appointed for this and other purposes at once. So in the requirement that the inspectors shall be on hand to inspect the causes of loss of life when it occurs by explosions in mines, this is to be their duty from and after the passage of the act, as it goes into operation from and after its passage; and so in regard to the 15th section of the Schuylkill Act. It is to expire on the 1st of June, 1870, when inspectors are to be appointed by the courts, under the provisions of the 14th section of this act, for Schuylkill, Dauphin, Northumberland and Columbia counties. If no appointment of examiners can be made in Luzerne county, because the first term of the court for the present year has passed by, it is likely the same thing exists in regard to those counties. Is it likely that such a cause of delay could have been a possible contingency in the legislative mind? We think not. As already said, the intention is manifest, not only in the provisions mentioned, but in many others in the act—nay, throughout the entire act—that it was to go into full operation as soon as the organization of its machinery would permit. We must therefore construe the seemingly incongruous provisions noticed so as to harmonize with the general intent manifested in the whole enactment. We can do so without violence to any portion of it, we think, by holding the provision in question applicable to future years and not to the present. For the fraction of this year ensuing the passage of this act, the organization and appointment of the examiners mentioned, were not referred to any period, excepting to the first term of the court after the passage of the act; thereafter, it is to be at the first term of the court in the year. This view enables the governor to appoint inspectors as required by the act, and put the intended reform of the mining police in operation. In this way, and in this alone, can the provisions of the act be harmonized, and the manifest intention of the legislature carried out. We may thus make the statute effectual for the purposes intended. Dwarris on Stat. 514-17, says, "Wherever a power is given by statute, everything necessary to the making it effectual is given by implication." We must, we

think, enter judgment for the Commonwealth on the demurrer, and award a peremptory mandamus against respondents.

Ordered accordingly.

THE THOMAS IRON COMPANY V. THE ALLENTOWN
MINING COMPANY ET AL.

(28 New Jersey Equity, 77. Court of Chancery, 1877.)

Order for inspection granted without notice. The defendants being lessees of a mine, entered upon the adjoining land belonging to the plaintiff and sunk a shaft thereon and mined ore through it, and having ceased operations, and being about to leave the mine, refused, on application, to permit the plaintiff to enter the mine for inspection. The plaintiff thereupon, without notice to the defendants, filed a bill for an injunction requiring the defendants to permit the inspection, which was granted: *Held*, that the granting of the order for inspection being a matter of course on a *prima facie* case, notwithstanding a sworn denial of the defendants, it might at the discretion of the court be made without notice to the defendants, but it is the better practice to require notice, enjoining, in the meantime, so far as may be necessary to preserve the *status quo*.

¹ **Loss of surface support and floodings endangered by removing pillars.** The defendants having worked out the main body of ore from the mine, proceeded to get ore by reducing the pillars which had been left for support, and thus endangered the caving of the surface and the flooding of the mine by letting the waters of a swamp into the workings, whence it would flow to plaintiff's mine: *Held*, that an injunction to restrain defendants from weakening the supports was properly granted.

Bill for relief and supplemental bill, answer and affidavits.
Motion to dissolve injunctions and dismiss bill.

J. VANATTA, for the motion.

I. W. SCUDDER, A. G. RICHEY and J. G. SHIPMAN, *contra*.

THE CHANCELLOR (RUNYON.)

The original bill was filed to restrain the defendants, the

¹ *Crompton v. Lea*, 6 M. R. 179.

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Bakers, lessors, and the Allentown Mining Company, lessees, from preventing the complainants from entering into the mine owned by the former, and leased to and worked by the latter, to inspect the workings so as to ascertain to what extent they had been done upon the mineral property of the complainants. The bill, which is duly verified, states that the Baker mine property and that of the Thomas company adjoin each other, and that before the filing of the bill the Allentown company had, without the authority or knowledge of the complainants, sunk a shaft in their mining operations upon the property of the complainants (as the latter had recently discovered), and had through it mined and taken to their own use from the complainants' property about 40,000 tons of ore; that they had, when the bill was filed, ceased their mining operations on both properties, and were about to leave them altogether, and that they and the Bakers had refused the complainants permission to go down the shaft and make an inspection, to ascertain what working had been done in the complainants' property. The bill prays an account, but its main object was to obtain the inspection. On the filing of the bill an injunction was issued restraining the defendants from preventing the complainants, their servants or agents, from entering the mine and remaining therein for the purpose of making explorations and surveys, to ascertain, as far as might be practicable, the amount of iron ore which had been taken from the mine (provided that they should not take possession of the mine, nor any part thereof, nor remain therein any longer than might be reasonably necessary for the above mentioned purposes, and that they should do no injury to the property or possession of the defendants, nor interfere with their business) and also from removing the pillars or supports in the mine, and from doing any other wrong or injury which would hinder or destroy the access to the mine, or hinder or prevent the free exploration and survey thereof for the purposes above mentioned. The inspection was permitted under the injunction.

The supplemental bill was filed to prevent the defendants from weakening the pillars and supports of their own mine, or their workings in the complainants' property, to such an extent as to endanger the caving in of the surface, and so filling in the places worked as to let in the water from a swamp

over their mine, which would flood the complainants' mine property which had been worked by the defendant company. This bill was duly verified, and on it an injunction was issued, restraining the defendants from removing or weakening any of the pillars or supports of either of the mines, their own or the complainants, so as to endanger the falling of the earth or mine roofs supported thereby. The defendants have answered the original bill, and now move to dissolve the injunctions and to dismiss the bills. The injunction to restrain the defendants from preventing an inspection has served the purpose intended, and the motion to dissolve it is based on the ground that it was improvidently granted. That the case made by the bill warranted an injunction is too clear for dispute. If, as the bill alleged, the defendant company had entered upon the complainants' property and there sunk a shaft and mined ore through it, and having ceased their operations, and being about to leave the mine, refused, on application, to permit the complainants to enter the mine for inspection, and the complainants were apprehensive, and had reason to apprehend, that the defendants would destroy the evidence of their operations and so render it impossible for the complainants to obtain compensation or satisfaction in the premises, they were entitled to an injunction, at least to restrain the defendants from destroying the evidence, a thing which they might do under an honest but mistaken claim as to the boundaries of their property. It appears clearly that the defendants refused the complainants' permission to make the inspection. On the 10th of June, 1876, the engineer of the latter applied to the mining superintendent of the Allentown Company, at the mine, for permission to enter the mine to make the inspection. The superintendent replied that leave could not be granted without the consent of Mr. Baker, one of the lessors, and referred him to the latter accordingly. Mr. Baker says that on that day two agents or employes of the complainants asked him if he was willing that they should go down into the mine and look at it. He says he replied that they must go to the Allentown company; that he had nothing to do with it; that they then said they had seen the superintendent of the Allentown company and he would not give them permission unless Mr. Baker gave it; and that he replied to that statement, "You

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must go to the Allentown company; they are lessees, and have all to do with it." He says that he further said that he would give no permission, but that if the Allentown company did so, he would make no objection to it.

These statements, from the answer, fully corroborate the allegation of the bill, that the defendants refused the complainants permission to make inspection. Nor is it alleged by the defendants that they were not fully aware of the reason for desiring to make the inspection. It would seem that it ought to be quite a matter of course for the parties to allow an inspection, on application, under such circumstances. After a refusal under the circumstances as stated in the answer itself, it would be the duty of the court to secure to the complainants the inspection, if satisfied of the *bona fides* of their application. But the defendants' counsel insists that the order (for such the injunction was practically) for inspection ought not to have been made without giving to the defendants an opportunity to be heard in relation to it; that is, it should not have been made except on notice. In a case like the present, where the application is for the inspection of a worked-out and almost abandoned mine, to ascertain the extent of the workings merely, and it appears that leave has been refused, the granting of the order for inspection is, on the making out of a *prima facie* case entitling the complainant to it, almost a matter of course. In *Bennett v. Whitehouse*, 28 Beav. 119, the court (M. R.) said: "Whenever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted, still as the only way of ascertaining the fact is by an inspection, the court always allows it, if it can be done without injury to the defendant." That was a case where the plaintiff and defendant were lessees of adjoining coal mines, and the former, having some reason to suspect that the latter was working from his own mine into the plaintiff's and taking coal therefrom, applied to him for leave to go down the pits into the defendant's colliery to inspect the working. The defendant denied altogether that he was working into the plaintiff's gallery and refused the permission. And he denied the trespass by his answer. The leave to inspect was granted, however.

In *Lewis v. Marsh*, 8 Hare, 97, a lessor of a coal mine filed a bill against his lessee for an account, and to restrain him from working certain parts of the mine, the court (V. C. Wigram) based the order on the ground of necessity. He says: "I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party can not get his rights without proving what his rights are, and it is inherent in the case that the plaintiff should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to. If there had been a shaft-going through the plaintiff's land, there would not be the slightest doubt as to the plaintiff's right to go down and inspect the works." See also, *Ennor v. Barwell*, 1 De G., F. & J. 529.

If the granting of the order for inspection is a matter of course on a *prima facie* case, notwithstanding the sworn denial of the defendant, it would seem that it might, at the discretion of the court, be made without notice to the defendant. It is undoubtedly, however, the better practice to require notice, enjoining, in the meantime, so far as may be necessary to preserve the *status quo*.

The injunction to restrain the defendants from weakening the supports of their mine to such an extent as to endanger the caving in of the surface, and especially the flooding of the mines with the water of the swamp, was a proper exercise of the power of the court. The bill and the affidavits of verification show reasonable ground of apprehension lest, through the weakening of the supports, the surface should cave in and let the water of the swamp into the defendants' mine, whence it would flow into the mine of the complainants. Were it to do so, it is alleged that it would cause damage to the complainants to the amount of \$50,000.

The defendants' mine was, when the bill was filed, worked out, and the lessees, the Allentown company, were getting ore by means of the reduction of the pillars which had been left for support, and they proposed to continue doing so to the end of their term, which was some months distant. The complainants allege that the defendant company, under their lease, have mined to a great extent upon the complainants'

land. The Bakers, as lessors, have had the benefit of the trespass, if such there has been, in the royalty paid them by their lessees. If the defendants have indeed thus trespassed upon and opened the complainants' land, it is no stretch of authority to prohibit them from such a use of their own property as will inflict damage on that of the complainants. And even if the complainants' mine at the Baker line had been opened by themselves, it would have been the duty of the court to have protected them from this threatened injury under the circumstances. The maxim, *sic utere tuo ut alienum non lædas*, would have furnished sufficient ground for such relief. The defendants have, on the case made by the complainants, opened and worked the mine on the land of the latter in connection with the mine on their own property. If the latter is flooded, the former must be; and the court will not, in such a case, hesitate to restrain the trespasser from an act which will inflict such an injury on the property on which he has trespassed. The affidavits on the part of the defendants do not overthrow the case made by the complainants for the injunction.

The motion to dissolve must be denied, with costs. Nor can the motion to dismiss the bills prevail. It is based on the ground that the complainants have an adequate remedy at law. The original and supplemental bills are both injunction bills. The latter seeks no other relief. The former prays an account, indeed, but it is in fact filed for the purpose of obtaining an inspection and discovery. As to all other relief, the complainants submit themselves to the direction of the court.

EX PARTE DEIDESHEIMER.

(14 Nevada, 311. Supreme Court, 1879.)

Superintendent of mine refusing admission to stockholder. By certain acts of the legislature of Nevada, Stat. 1877, 80, Stat. 1879, 57, to protect the rights of stockholders in the mines of that State, it is made

the duty of the superintendent of a mine to keep posted in some conspicuous place at or near the mine, the day of the week on which authorized stockholders may be admitted; and a failure to comply with any of the conditions mentioned in the act is declared to be a misdemeanor. *Held*, that the statute does not command the superintendent to admit stockholders, nor is he in terms forbidden to refuse admission, and such refusal can not by implication be construed into a violation of the statute.

Strict construction of penal statutes. Penal laws generally prescribe what shall or shall not be done, and then declare the consequences of a violation of either requirement. They should be plainly written, so that every person may know with certainty what acts or omissions constitute the crime.

Habeas Corpus. The facts appear in the opinion.

B. C. WHITMAN and C. J. HILLIER, for petitioner.

STONE & HILES, SEELEY & WOODBURN, and M. A. MURPHY, Attorney-General, for the State.

By the Court, LEONARD, J.

The petitioner, Philipp Deidesheimer, is brought before me in chambers on *habeas corpus*, with a return showing he was arrested and is detained under a warrant of arrest issued by Thomas Moses, justice of the peace of Township No. 1, Storey county, by James Jewell, constable of said township. There is no dispute as to the facts, which are as follows:

On the twenty-eighth day of July, 1879, the petitioner was the duly qualified and acting superintendent of the Hale and Norcross Mining Company, a foreign corporation incorporated for the purpose of working upon and mining in the Comstock lode, in Storey county, and on that day A. B. Thompson, who, as owner and agent, was possessed of one fifth of one per cent. of the original capital stock of said corporation, applied to said justice, under and in accordance with the provisions of section 1 of the statute hereafter noticed, found on page 57, statutes of 1879, for an order to examine the shafts, adits and hoisting works of the mine of said corporation. Thereupon the justice delivered to Thompson an order directed to petitioner as superintendent, commanding him "to admit Thomp-

son into said mine and permit him to examine fully all parts of the shafts, adits, borings, drifts, stopes, winzes, hoisting apparatus and every and all properties and appurtenances belonging to said mining company." Thereafter, on said day-Thompson presented the order to petitioner at the mine of the company, and demanded to be admitted. Petitioner then and there refused to comply with the order, or any part thereof. At the time of the application and refusal just mentioned, there was posted in a conspicuous place at the mine, a notice, of which the following is a copy:

"VIRGINIA, NEVADA—NOTICE! In compliance with the provisions of the act of the legislature of the State of Nevada, touching the examination of mines, etc., Monday is named as the day of the week in which authorized stockholders may be admitted under the provisions of said act.

"PHILIPP DEIDESHEIMER, Sup't."

It is admitted that petitioner complied with the law in relation to posting notice.

A complaint upon oath was thereupon laid before the justice, charging petitioner with the crime of refusing him, the said Thompson, admittance to the underground works and mine of the Hale and Norcross Mining Company, upon the Comstock lode, in Storey county, Nevada, contrary to the provisions of an act of the legislature of the State of Nevada, entitled "An act to amend an act, entitled 'An act to protect the rights of owners of stock shares and other interests in the mineral and metal yielding mines of this State.' Approved February 21, 1877." A warrant of arrest was issued and placed in the hands of the constable, who arrested petitioner, and he is now detained under said writ. The warrant is conceded to be in due form; but it is alleged in the petition, and claimed by counsel for petitioner, that such warrant was and is without authority of law.

It is said by counsel for the State, that if petitioner is discharged, the order therefor must be based upon some one or more of the grounds set out in section 20 of the Habeas Corpus Act (Stat. 1862, p. 100); that he must bring his case within either or both of subdivisions fourth and sixth of such section, which provide that the petitioner may be discharged.

* * * "Fourth—When the process, though proper in

form, has been issued in a case not allowed by law." * * *
"Sixth—Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law."

As I view the case, it may be decided by asking and answering the question submitted by counsel for the State as the main one in controversy, to wit: "Was this warrant issued in a case allowed by law, or is the process authorized by any provision of law?"

The original statute, entitled "An act to protect the rights of owners of stock shares and other interests in the mineral and metal-yielding mines of this State," was passed and approved in 1877. (Stat. 1877, p. 80.)

In 1879, section 1 of the statute just referred to was amended, but section 5 was not amended or re-enacted.

It is urged by counsel for petitioner, that section 5 of the statute of 1877 only attaches to a violation of the provisions or conditions of section 1 of that act, and that it does not attach or apply to a violation of the provisions or conditions of section 1, as amended in 1879. In my opinion section 1 as amended, and section 5 in the original act, must be construed together, as though the former had been incorporated in the prior act at the time of its adoption: *Holbrook v. Nichol*, 36 Ill. 161; *McKibben v. Lester*, 9 Ohio St. 627; Sedgwick on the Construction Stat. Law, 68.

For the purposes of this case, section 1 of the statute of 1879, and section 5 of the statute of 1877, may be epitomized as follows:

"Section 1. Any person being the *bona fide* owner of one fifth of one per cent. of the original capital stock of any company incorporated for the purpose of working upon and mining in any lode * * * of precious or useful metals in this State, and any number of persons being the *bona fide* owners, in the aggregate, of such amount of stock, at the time application for a permit to examine any such mine shall be made, such owner or owners, upon a written order from the county clerk or justice of the peace, * * * shall be entitled to the privilege of fully examining all of the shafts, adits, borings, drifts, stopes, hoisting apparatus, and every and all properties and appurtenances belonging to such mining company; *pro-*

*vided, that not more than one owner of said percentage or aggregate percentages of such mining stock shall, either in person or by agent, be entitled to such order * * * oftener than twice in one month; these days shall not be more than fourteen non less than fifteen days apart. It shall be the duty of the superintendent or other person or parties in charge of any incorporated mining claim * * * to keep posted in some conspicuous place at or near the mine, the day of the week in which authorized stockholders may be admitted under the provisions of this act."*

"Sec. 5. Any mining superintendent, or mining foreman, or mining secretary, of any incorporated mining company in this State, acting under and for such mining company, *who shall fail or refuse to comply with any of the conditions mentioned in section 1 of this act, shall, for each and every such failure or refusal, be deemed guilty of a misdemeanor,*" etc.

It is claimed on the part of petitioner that the only condition or duty imposed upon him is that he shall post the notice, and that, inasmuch as he did that, he is guilty of no crime under the statute, either by neglect or refusal; that in addition, the first section is only a declaration of the rights of certain stockholders, and that if those rights are infringed the remedy is against the company and not the superintendent. In a word, it is claimed that the superintendent has not violated any of the conditions or provisions of section 1. On the other hand it is urged by counsel for the State, that the "conditions" referred to in the fifth section are the performance of two obligations or duties by the superintendent, viz.: First, to post the notice, which is required in express terms; and, second, to admit the stockholders, which is required by necessary implication.

The last part of section 1, in relation to posting the notice, may be disregarded; because, if that is the "condition" intended in section 5, it is admitted that petitioner has fully complied therewith. I have nothing to do with the policy of the law under examination. My duty is limited to a consideration of the question whether or not the petitioner is unlawfully restrained of his liberty, under and by virtue of the warrant of arrest above mentioned; and the solution of this

question for or against him depends entirely upon the conclusion arrived at in answer to the further inquiry: Was his refusal to admit Thompson a violation of any of the conditions or provisions of section 1? In other words, is it a provision or condition of section 1 that the superintendent in charge shall admit the qualified stockholders?

As before stated, it is admitted by counsel for the State that if the admission of qualified stockholders by the superintendent is one of the "conditions" referred to in section 5, it becomes so by necessary implication rather than by express words. And if such admission is a plain duty which the superintendent can not fail or refuse to perform without being guilty of a misdemeanor, it becomes so only by reason of the declaration that "such owner or owners * * * shall be entitled to the privilege of fully examining all the shafts * * * and every and all properties and appurtenances belonging to any such mining company."

The statute makes the posting of notice the superintendent's plain duty; but he is not commanded to admit stockholders, nor is he in terms forbidden to refuse admission. Penal laws generally prescribe what shall or shall not be done, and then declare the consequences of a violation of either requirement.

They should be plainly written, so that every person may know with certainty what acts or omissions constitute the Crime: Bish. on Stat. Crimes, Sec. 193; Beccaria on Crimes, 22, 45; *The Schooner Enterprise*, 1 Paine, 33.

Beccaria says: "I do not know of any exception to this general axiom, that every member of the society should know when he is a criminal and when innocent." (45.)

"There is nothing more dangerous than the common axiom, the spirit of the laws is to be considered. To adopt it is to give way to the torrent of opinions. This may seem a paradox to vulgar minds, which are more strongly affected by the smallest disorder before their eyes than by the most pernicious, though remote, consequences produced by one false principle adopted by a nation. Our knowledge is in proportion to the number of our ideas. The more complex these are, the greater is the variety of positions in which they may be considered. Every man hath his own particular point of

view, and at different times sees the same objects in very different lights. The spirit of the laws will then be the result of the good or bad logic of the judge; and this will depend on his good or bad digestion, on the violence of his passions, on the rank and condition of the accused, or on his connection with the judge, and on all those circumstances which change the appearance of objects in the fluctuating mind of man. Hence we see the fate of a delinquent changed many times in passing through the different courts of judicature, and his life and liberty victims to the false ideas or ill humor of the judge, who mistakes the vague result of his own confused reasoning for the just interpretation of the laws. We see the same crimes punished in a different manner at different times in the same tribunals; the consequence of not having consulted the constant and invariable voice of the laws, but the erring instability of arbitrary interpretation." (22.)

In the case of *The Schooner Enterprise*, Mr. Justice LIVINGSTON used the following language: "The act, and particularly that part of it under which a forfeiture is claimed, is highly penal, and must, therefore, be construed as such laws always have been and ever should be. But while it is said that penal statutes are to receive a strict construction, nothing more is meant than that they shall not, by what may be thought their spirit of equity, be extended to offenses other than those which are specially and clearly described and provided for. A court is not, therefore, as the appellant supposes, precluded from inquiring into the intention of the legislature. However clearly a law be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, permitted to arrive at this intention by mere conjecture, but it is to collect it from the object which the legislature had in view and the expressions used, which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government." * * * "If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature." * * * "The attention of the court has been called to a history of the progress of the several laws relating

to the embargo, and to the mischiefs which were unprovided for, at the time of the passage of the one under consideration, in order to show what was intended by the legislature. Almost every possible evasion, it is said, had been previously guarded against by adequate sanctions, except that of loading clandestinely or by night, and then watching an opportunity of going to sea without a clearance, or giving bonds, which was the evil to which it was intended to apply a remedy. Be it so. This may have been in the contemplation of Congress, but we are not bound to conclude that they have done what was intended, unless fit words be used for the purpose."

And in the *United States v. Wiltberger*, 5 Wheat. 76, (opinion by Chief Justice MARSHALL,) the court says: "It has been said that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered within the letter of the statute. So if it be within the reason of the statute. The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. * * The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so." See also, Sedgwick on Construction of Stat. and Const. Law, 279, *et seq.*; Smith's Commentaries, Sec. 746; Bish. on Stat. Crimes, Sec. 192, *et seq.*

In *Jones v. Smart*, 1 T. R. 52, BULLER, Justice, says: "We are bound to take an act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws."

Mr. Dwarria says: "The result is, that to bring a case

within the statute it should be not only within the mischief contemplated by the legislature, but also within the plain, intelligible import of the words of the act of Parliament." Dwarris on Statutes, 711.

That such should be, and is, the fundamental rule in relation to penal statutes admits of no doubt. Nor are the cases cited by counsel for the State in any manner opposed to the rules stated above. See *United States v. Winn*, 3 Sumner, 209; *The Emily and The Caroline*, 9 Wheat. 381.

There can be no better example of the great danger of resorting to implications in order to find that a crime has been committed than the argument of counsel for the State in this case. They say: "There are many acts in connection with the visit of the stockholders to the mine, which the statute only impliedly makes it the duty of the superintendent to perform; as, for example, to furnish the stockholder with the machinery and appliances usually had and used in and about the mine for ascending and descending the shaft, and, if necessary, to furnish him with a proper guide to assist him in examining the shafts, adits, borings, drifts, stopes, hoisting apparatus, and every and all properties and appurtenances belonging to such mining company; and if he should fail or refuse to perform such acts, he would be violating the statute, although the doing of such acts is not enjoined upon him by the express terms of the act."

I do not intend to intimate whether it would be the superintendent's duty to furnish any or all the means of examination suggested by counsel, if it be true that in a criminal case implied duties may be multiplied, as counsel claim. This argument is referred to only to show the danger of finding a statutory crime where the words do not plainly authorize it. If counsel are correct, what superintendent could ever know when he is within or without the statute? One stockholder might demand one thing and another something else. If the superintendent must furnish a guide, although nothing is said about it in the law, why should he not, with equal propriety, be required to furnish rubber coats and boots, if the mine is wet, and such articles are used in the mine?

If he can not go to the law and there find what is required

of him, or what he is prohibited from doing, his only safe course would be to comply with every request made; for should he fail or refuse to comply, if counsel are correct, it might be decided that he refused to perform an implied duty, which is one of the conditions of section 1. Suppose we had this statute in substance:

SECTION 1. Every county assessor, before making an assessment shall be entitled to the privilege of examining the books of all firms, corporations and individuals selling merchandise within his county.

SEC. 2. Any person having charge of such business, whether principal, agent or superintendent, who shall fail or refuse to comply with the conditions of section 1, shall be deemed guilty of a misdemeanor and be punished, etc.

Under that statute, the assessor goes to a Chinese corporation selling merchandise, and demands of the person in charge the privilege of examining the books. They are produced, but are kept in the Chinese language. The assessor, being unable to understand the Chinese method of book-keeping, demands an interpreter, upon the ground that it is an implied duty on the part of the corporation to furnish one.

Even admitting that implied duties or prohibitions, within reasonable limits, may be considered in relation to penal statutes, in my opinion it is not such duty to furnish a guide in the one place or an interpreter in the other. But other judges might think otherwise, and thus we see some of the evils liable to arise from an equitable rather than a strict construction of penal statutes—some of the evils so vividly portrayed by Beccaria; thus we see that superintendents would be in continual doubt as to their duties, and, consequently, would not know with certainty when they could with impunity refuse a stockholder's request. The legislature may have intended to require of the superintendent all that is claimed by counsel for the State; but if such was the intention, they failed to use any fit words expressing the same. In their absence I am unable to arrive at the conclusion that the petitioner committed any offense in refusing to admit the complainant to the Hale & Norcross mine and works. It follows that he is detained without authority of law and must be discharged. I am permitted to

add, that in the above construction of the statutes referred to, my associates fully concur.

The petitioner is discharged.

1. For instance of inspection and view, with excavation, at a cost and to a degree amounting to oppression, see *Stockbridge Co. v. Cone Works*, 6 M. R. 317.

2. New trial granted on account of jury, on inspection, being treated by the successful party: *Sacramento Co. v. Showers*, 6 Nev. 291. See *Schissler v. Chesshire*, 5 M. R. 309.

3. Each associate has the right to inspect the partnership books: *Bute v. Stuart*, 12 L. J., Ch. 140; *Maden v. Veecers*, 7 Beav. 489.

4. The court may order inspection of mines: *Ennor v. Barwell*, 1 DeG. F. & J. 523; *Post PLEADING*: And a survey and plat: *Att'y Gen. v. Chambers*, 12 Beav. 129.

5. Inspection, with injunction, and cost of searching out the holes which caused flooding: *Plant v. Stott*, 6 M. R. 175.

6. Surface owners allowed to inspect mines, for protection of building: *Dugdale v. Robertson*, 3 Kay & J. 693. *Post SURFACE SUPPORT.*

WHALLEY V. RAMAGE.

(10 Weekly Reporter, 315. Superior Court of Equity, 1862.)

Mode of working mine. In the absence of express contract, the lessee of a mine is entitled to work the minerals by "instroke."

In this case, which involved various complicated questions as to the working of certain mines, held under an agreement for a lease to be granted by the plaintiff, the following point was decided, the importance of which arose from the mode of working carried on by the lessees, who had thus been enabled to escape payment of tolls for carriage of minerals over a railway of the plaintiff.

DANIEL, Q. C., and G. OSBORNE MORGAN, for the plaintiff.

ROLT, Q. C., and COTTON, for the defendant.

WOOD, V. C., *held*, that in the absence of express contract, the lessee of a mine has a right to work the minerals by "instroke," that is, by or through pits sunk upon adjoining lands held by the lessee under a different lessor.¹

¹ See "Bainbridge on Mines," p. 90 (2d Ed.), where the terms "instroke" and "outstroke" are explained: also Rogers, 403.

1. Lessees may rightfully work by instroke: *Lewis v. Fothergill*, L. R. 5, Ch. App. 103; *Post WORKINGS*; *Jegon v. Vivian*, L. R. 6, Ch. App. 742; *Post LEASE*.

2. Instroke is a workmanlike means of mining: *Jegon v. Vivian*, *supra*.

THE LYCOMING FIRE INSURANCE COMPANY V.
SCHWENK ET AL.

(95 Pennsylvania State, 89; 40 Am. Rep. 629. Supreme Court, 1880.)

Policy avoided by riot. A policy of insurance provided that the company should not be liable "for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion or military usurped power." *Held*, that where a breaker at a coal mine was set on fire at night by a party of men who fired a number of shots, drove the watchman away and then burned the breaker, there was a riot within the meaning of the policy.

Arson defined into a riot. The burning of a coal breaker by a band of men who discharge fire-arms and drive away the watchman is a riot, although the element of a turbulent disturbance of the public peace may be wanting.

June 7, 1880. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXON, TRUNKY, STERRETT and GREEN, JJ.

Error to the Court of Common Pleas of Northumberland County, of May term, 1880. No. 135.

Covenant by William Schwenk and Jacob Geise, trading as William Schwenk & Co., for the use of Henry Saylor, against the Lycoming Fire Insurance Company, upon a policy of insurance upon a coal breaker and machinery near Mount Carmel, in Northumberland county.

The defendant pleaded:

1. That the property alleged in the declaration to have been burned and destroyed by fire "was burnt and destroyed by rioters in the perpetration of a riot, and not in any other manner;"
2. That the burning and destruction of the said property "was caused by means of a riot and not in any other manner;"
3. That the burning and destruction of the said property "was caused by means of a civil commotion, and not in any other manner." The defendant pleaded further "*non est factum*, covenants performed *absque hoc* and *nil debet*."

It was provided by the policy that the defendant should not be liable by virtue of this policy "for any loss or damage

by fire caused by means of an invasion; insurrection, riot, civil commotion, or military or usurped power," and also that "persons sustaining loss by fire or lightning, under a policy, shall give notice thereof forthwith to the secretary, and within thirty days of said loss deliver to the secretary a particular account and proof thereof, signed and sworn to by them, setting forth among other things: "sixth, the date of the loss and the amount thereof; seventh, how the fire originated, so far as said persons know or believe." A fire occurred on the third of June, 1875, and a statement of the loss, sworn to by William Schwenk, on the 22d of June, 1875, purporting to give a particular account of the loss and the origin of the fire was sent to the secretary of the company, in which among other things was the following: "A fire occurred on the third of June, 1875, at about the hour of ten o'clock, P. M., and originated as follows, viz.: Of my own personal knowledge I do not know, but the two watchmen who were in charge of the premises say that about seventy-five men came to the breaker, and while some stationed themselves as pickets, others carried wood for kindling to the boiler-house and after saturating the wood and parts of the building with coal oil, set fire to it, and then remained and guarded the premises until they were satisfied that destruction to the breaker was certain." No notice of any other cause of the fire was ever given to the company, and on the trial the defendant contended that this was notice that the property was burned and destroyed by means of a riot, and also proved by the watchmen and others that the property was set on fire and destroyed in the manner stated in the notice.

The sixth and seventh points of the defendant with the answers of the court thereto were as follows:

6. That if the jury believed that the breaker was destroyed by fire in the manner testified by Timothy Adams, their verdict ought to be in favor of the defendant.

Ans. "I can not charge you as requested as a matter of law, but say to you that I have already in the general charge defined the offense of riot, and have just told you, in answer to the foregoing points of the defendant, what circumstances would be deemed a riot so as to constitute a defense to the plaintiff's claim, and I now submit the tes-

timony of this witness with all the other evidence in the case to you, from which you are to find the facts." 10th assignment of error.

7. That if the jury believed that the breaker was destroyed by fire and in the manner testified by Albert Ford, their verdict ought to be in favor of the defendants.

Ans. "I can not charge you as requested in this point as a matter of law, but say to you that I have already in the general charge defined the offense of riot, and have just told you, in answer to the foregoing points of the defendant, what circumstances would be deemed a riot so as to constitute a defense to the plaintiff's claim, and I now submit the testimony of this witness with all the other evidence in the case to you, from which you are to find the facts." 11th assignment of error.

The material portions of the testimony of Adams and Ford will be found in the opinion of this court. In the general charge the court, ROCKEFELLER, P. J., *inter alia*, said:

["For the present I will say to you that a riot at common law is the tumultuous disturbance of the public peace by three persons or more, assembling together of their own authority, with the intent mutually to assist one another against any who shall oppose them in the execution of some private object, and afterward executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended is lawful or unlawful.] First assignment of error. [In order to prove a riot it is necessary at common law to prove on the trial a previous unlawful assembling. It must be shown that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least by such apparent tendency thereto as would inspire the people with terror, such as being armed, using threatening speeches, turbulent gestures or the like. If the assembling of persons be not accompanied with such circumstances as these, it can not be deemed a riot, however unlawful the acts which they actually committed.] Second assignment.

["Then at common law it was also necessary that there should be a tumultuous disturbance of the public peace. By that is meant, we think, a violent, turbulent, disorderly and noisy disturbance of the public peace.] Third assignment.

Then this disturbance must be by three or more persons, and they must have assembled together of their own authority, with the intent mutually to assist one another against all persons who might oppose them in the execution of some private object, as for instance, in the burning down of some building or anything of that kind. Then it must be shown that they afterward actually did execute this object in a violent and turbulent manner, to the terror of the people.

“While the law is for the court to determine, and you are bound by the instructions of the court on questions of law, yet you are to determine the facts from the evidence in the case, and you must have reference in making up your verdict to all the facts and circumstances in the evidence.

“Then if you believe the evidence, on the night of the 3d of June, 1875, the plaintiffs’ property was destroyed by fire. You will recollect the testimony of the witnesses on the subject as to what took place at the time that the property was destroyed, for which the plaintiffs seek to recover the insurance in this case. Timothy Adams stated that he was there, employed by the plaintiffs, William Schwenk & Co., as watchman; that on the third of June, at about eleven o’clock at night, he heard a noise in the bush, a rustling in the leaves. He didn’t know for certain what was there, but he fired his gun, and immediately after his firing, it was returned by another, proceeding from the direction of this noise in the woods, and presently by another shot, and then in a short time he says there was a volley fired. At one time he said there might have been fifty or seventy shots, and again he said that there might have been only four or five, six, seven or eight. What is meant by a volley was the firing of a number of shots. Then, he says, presently a number of men, probably seven or eight, came out to the breaker and he heard them talking. He was up on the plain of the breaker above them and he heard one of them asking for some wood and another asking for some coal oil; soon after that the breaker was on fire. He doesn’t speak of any noise having been made by these men except the firing of the pistols, as he thought, previous to the time of setting fire to the breaker. He moved on down the plain and finally got inside of the drift and remained there a short time, when he saw the men going away. He doesn’t speak of their having made any noise at the time they were going away.

"Then you heard the testimony of Alfred and Joseph Ford and Harriet Farley, all persons who were in the neighborhood the evening of this fire, and you will determine from these witnesses what actually did occur on that occasion—Young Mr. Ford that he saw the men coming down the railroad; that he heard them talking loudly.

"[You will take into consideration all the evidence. Was this a riot? Was this a tumultuous disturbance of the public peace by three or more persons assembled there together of their own authority, with intent mutually to assist one another against any who should oppose them in the execution of their purposes, or in the burning of the breaker or other property? Did they burn the breaker and other property in a violent and turbulent manner, to the terror of the people?] 4th assignment. You heard the testimony, so far as terror is concerned, of Harriet Farley. She was on her way home from Mount Carmel; she testified as to what she heard and saw. You heard the testimony of Alfred Ford in regard to whether he was put in terror, and the testimony of Timothy Adams on the same subject. [You will determine from all the evidence whether the acts of shooting and the noise that was created by the firing of the building were violent and turbulent acts, and whether they were to the terror of the people. We think that it is not necessary that there should have been shouting or blowing of horns; that the noise caused by the shooting off of guns and pistols would be a tumultuous disturbance of the public peace.]"

The 12th assignment of error was as follows:

"Because the general charge of the court as to what constitutes a riot, differs from, and is in conflict with, the law as is stated by the court, by affirming the third and fifth points of the defendant below, which the court below affirmed to be correct to such a degree as to be contradictory and irreconcilable, and this contradiction tended to confuse and mislead the jury, and prevented them from obtaining from the charge any idea of what is necessary in law to constitute a riot, to-wit, the court in their general charge say, 'Then at common law it was also necessary that there should be a tumultuous disturbance of the public peace. By that is meant, as we think, a violent, turbulent, disorderly and noisy disturbance of the public peace, etc.'"

The following are the third and fifth points, with the answers of the court:

3. "That if any persons to the number of three or more shall meet together with clubs, staves or other hurtful weapons, to the terror of the peaceable people or inhabitants of this commonwealth, and shall commit or design to commit violence or injury upon the persons or goods of any of the said inhabitants, such persons are guilty of riot."

Ans. "I answer this point as requested."

5. That noise is not a necessary element of a riot, nor is it necessary that any person should be put in actual fear, but if a number of men, to the number of three or more, banded together for the purpose of destroying the breaker of the plaintiffs, and having armed themselves with pistols or other arms or weapons, went to the said breaker with the determination and purpose to destroy it, against any resistance that the watchman there might offer, and did actually destroy it by fire, the plaintiffs can not, under the terms of the policy of insurance, recover in this suit, and the verdict ought to be in favor of defendant.

Ans. "Affirmed."

Verdict for plaintiffs for \$2,473.33, and after judgment thereon, defendant took this writ and alleged that the court erred, *inter alia*, as set forth in the above assignments of error.

GEORGE HILL and JOSHUA W. COMLY, for plaintiff in error.

The definition of riot adopted by the court from Hawkins' Pleas of the Crown, Book 1, Chap. 65, page 293, does not correctly define the common law offense, and is not and never was the law of Pennsylvania: 3 Coke's Inst. 176; 4 Blackstone Com. 146; 2 Ben. Dig., *verbum* "riot;" *Pennsylvania v. Cribbs*, Add. R. 277; *Commonwealth v. Dupuy*, Brightly's R. 46; Lewis's U. S. Crim. Law, 72; *Shouse v. Commonwealth*, 5 Barr, 83; Act of 1705, 1 Bioren's Laws; Act of March 31, 1860, Pauph. L. 389.

If the breaker, structure and machinery of the defendants were unlawfully burnt by three or more men, banded together for that purpose, they were burnt and destroyed by means of a riot within the terms of the exception in the policy of insurance, and the court below erred in not so telling

the jury, instead of instructing them that they must find that the assembling of the offenders was accompanied with such circumstances as inspired the people with terror, and that there was a violent, turbulent, disorderly and noisy disturbance of the peace.

The testimony of Timothy Adams or Alfred Ford, standing alone, if believed by the jury, proved the case of a flagrant riot, and if the council for the plaintiff in error understand the reason of the court below for refusing to affirm the sixth and seventh points of the defendant below, it was because the court considered it to be their duty to leave all the evidence to the jury to find "whether the acts of shooting, and the noise that was created by the firing of the building were violent and turbulent acts, and whether they were to the terror of the people," and whether there was a tumultuous disturbance of the peace.

In the general charge, the court stated certain essentials, in their opinion, without which a riot can not exist or be proved, but in affirming the third and fifth points of the defendant below, they admit the possible existence of riot in which some of the elements declared to be essential, are wanting. This was calculated to confuse and mislead the jury.

S. P. WOLVERTON and J. B. PACKER, for defendants in error.

The definition of riot by the court below is abundantly sustained by authority: 2 Russell on Crimes, 247; Roscoe on Crim. Ev., 725; 3 Wharton's Criminal Law, 153, Sect. 2474, 6th Ed.; KING, P. J., in the case *in re* riots of 1844, 2 Clark 278; Angell on Fire and Life Insurance, Sect. 136; *Langdale v. Mason*, Park on Insurance, 965, 8th Eng. Ed. There was not a riot, nor was the destruction caused by means of a riot within the words of the policy. The men who burned the breaker were incendiaries, not rioters. They proceeded quietly to the breaker, and left it without noise or violence.

The testimony of Adams and Ford clearly shows that the breaker was not burned by men engaged in a riot, and the court could not have affirmed the defendants' sixth point without committing manifest error. As there is no statute defining riot in Pennsylvania, and the common law is still in force, it was the duty of the court to define and explain riot at com-

mon law. In doing this the court adopted the definitions approved by all writers on criminal law. After explaining riot at common law, they excepted the definition drawn by the defendants' counsel affirming their third, fourth and fifth points.

Mr. Justice GREEN delivered the opinion of the court, June 14, 1880.

The defendants' sixth point requested the court to say: "that if the jury believe that the breaker was destroyed by fire in the manner testified by Timothy Adams, their verdict ought to be in favor of the defendant." The seventh point made a similar request as to the testimony of Alfred Ford. Adams had testified that at about eleven o'clock at night, while he was watching at the breaker, "there was a lot of men came up to the breaker through the woods. I first heard them and I fired a shot; they fired too; they returned the fire and came up right away and set fire to the breaker. I seen some of them; now I couldn't tell you how many I seen that was there. I didn't see any before the breaker was on fire; I seen then maybe eight or ten; I can't tell how far they were away from the breaker when they commenced shooting; maybe fifty yards or so; they didn't make much noise."

Q. "What amount of shooting was done?" A. "It was a regular volley. I think may be there was fifty shots fired altogether; I heard them coming in the direction of the breaker. I did not go down until they had the breaker on fire; they came right up after the shooting and set fire to the breaker; after they set fire to the breaker I came down and went into the drift. * * * I didn't hear them say much, only when they came they said, 'Get out of this'; that is about all I think I heard."

Q. "How did they set fire to it?" A. "They got some fine kindling wood and poured some coal oil on; they hollered for it; one hollered for wood, and the other said 'Give me that coal oil;' that I heard; then they set it on fire; it burned pretty rapidly. * * * I can't say I was afraid; I didn't like to stay in the breaker anyhow; I didn't want to be burned up. * * * I was not in danger of being shot, because I was inside of the breaker; they couldn't shoot through; I was more in danger

of the fire than from being shot; I crawled down the plane over their heads."

Ford testified that he also was a watchman at the breakor on the night of the fire, and was in the office immediately before the fire, and heard four shots fired, one at a time, and then there was a silence. "After I heard the four shots, then there was a lot fired, just about I guess ten or fifteen yards from me; lots of shots; sounded to me like a volley of them.

* * * After the shots were fired they plunged into the office, one of the men, as soon as that volley of shots was fired, and asked who was there, but there was nobody there; I wasn't in the office at the time; I saw him coming into the office from the back window; I didn't see anybody else there at the time; I heard him ask who was there; I didn't make any answer to the question; I wouldn't have been here if I had, I guess; I went back of the office down in the bush and concealed myself. * * * I wouldn't like to fight against so many men."

We are decidedly of the opinion that in the foregoing testimony every element of riot is found; whether at common law or under our act of 1705. There was the unlawful assemblage of three or more persons, combined together to perpetrate an outrageous and violent crime; the commission of the crime was immediately preceded by numerous discharges of firearms. Two peaceable citizens engaged in watching and protecting the premises, placed there for that purpose, were compelled to flee therefrom in terror of their lives. The crime was arson, one of the most odious known to the criminal law. It was committed at a late hour of the night, when the great majority of persons are in their beds and asleep, and least prepared to defend themselves or their property. It is an offense having a more natural and necessary tendency to put whole communities in fear and terror than almost any other. In this instance it was accompanied by the voices of men calling for wood and oil with which to apply the fire, by the loud and appalling noise of exploding weapons of destruction, and the criminals themselves were a band of men whose numbers could not be determined on account of the darkness of the night. For a court in charging a jury to speak of such an occurrence as any thing less than a riot of the most marked and distinct character, would be simply to mislead them. We

think the learned judge of the court below, in his comments to the jury, dealt quite too leniently with the plain and undisputed facts of the case. He said to them, that to prove a riot there must be a previous unlawful assembling, accompanied with circumstances of force or violence, and "that if the assembling of persons be not accompanied with such circumstances as these it can not be deemed a riot, however unlawful the acts which they actually committed." From this the jury would naturally infer that unless the proof went back to the time when the men first met together, and established that such original meeting was attended with circumstances of actual force and violence, a case of riot could not be made out, no matter what acts of outrage and violence were subsequently perpetrated. Such is not the law as we understand it, and we consider it error to say, or to intimate, that it is, to a jury charged with the trial of such a case; we think, too, that the court rather overstated the necessity of proving "a violent, turbulent, disorderly and noisy disturbance of the public peace," in order to make out a case of riot. There was no controversy as to what were the facts; not a witness was called to give any other account of the occurrence than that testified to by Adams and Alfred Ford. Their credibility was not assailed or impeached in any manner. It was a case in which it would have been entirely proper for the court to characterize directly the criminal aspect of the facts testified to by the witnesses named. Instead of doing this, the learned judge told the jury they must decide whether they believed the witnesses, when there was not a shadow of doubt thrown upon their credibility; and if they believed them, they are to "determine the facts and circumstances." Whether the facts and circumstances constituted a riot he did not tell them, although expressly requested to do so in two points. In our opinion he should have affirmed the defendants' sixth and seventh points without qualification; for not doing so he was in error, as also in the general charge, for the reasons heretofore stated. We sustain the second, tenth, eleventh and twelfth assignments of error, and on these the case is reversed.

Judgment reversed.

1. Loss on copper disallowed on account of the mode of carriage: *Taunton Co. v. Merchants Ins. Co.*, 22 Pick. 103.
2. Petroleum not allowed to be kept under the term "merchandise" when specially prohibited by the policy: *Birmingham Ins. Co. v. Keogher*, 83 Pa. St. 64.
3. Prohibition against use of "refined coal or earth oils" construed as not prohibiting use of kerosene for lighting: *Bennett v. North B. & M. Ins. Co.*, 10 Rep. 409.
4. Whether "bundles of rods" are "bar iron" within the meaning of an insurance policy prohibiting the insurance of "bar iron" is a question of fact: *Evans v. Commercial M. I. Co.*, 6 R. I. 47.
5. "Gasoline" is included in a policy prohibiting "petroleum" and "kerosene:" *Kings County Ins. Co. v. Swigert*, 11 Ill. App. 590.
6. "Increase of risk" by using stove for warming "naphtha:" *Daniels v. Equitable Co.*, 48 Conn. 105.

YUNKER v. NICHOLS.

(1 Colorado, 551. Supreme Court, 1872.)

Right to convey water over another's land. In Colorado, lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands; but whether this right rests in grant, or upon the statute, or in the necessities of a dry climate, diverse opinions are expressed by the several judges.

¹ **Statute of Frauds—Executed license—Estoppel.** Y. and N. agreed, but not in writing, to construct a ditch for the conveyance of water with which to irrigate their lands and to share equally in using the water. N., whose land was above that of Y., diverted all the water of the ditch and thereby injured Y's. crops. In an action on the case for diverting the water, *held*, that the agreement was not within the Statute of Frauds, and that it was in the nature of an executed license, which N. was estopped to revoke.

² **Irrigation considered as a climatic necessity,** makes the right of ditch-transit, which is essential to its enjoyment, analogous to the case of a *way of necessity*.

Error to the District Court, Arapahoe County.

Yunker brought an action of trespass on the case against Nichols, for diverting water from an irrigating ditch leading from Bear Creek to the plaintiff's farm. It appeared that the ditch was constructed in the spring of the year 1871, by the plaintiff, the defendant, and one John Bell, under an agreement that they would share equally in the water conveyed thereby, such water to be used in irrigating the lands of the several parties respectively. After the ditch had been constructed to and across the defendant's land, so as to communicate and supply water to plaintiff's land, the defendant diverted the water from the ditch and caused the same to flow upon his own land, so that none passed down to the plaintiff whose lands were below those of the defendant, by means whereof the plaintiff's growing crop was greatly injured and diminished in value. It did not appear that there was any memorandum in writing of the agreement in respect to the ditch between the plaintiff, the defendant and Bell. The court

¹ *Gooch v. Sullivan*, 5 M. R. 15.

² *Schilling v. Rominger*, 4 Colo. 104, 109; *Union Co. v. Ferris*, 8 M. R. 90.

instructed the jury that, if the plaintiff's right to have water flow over the lands of the defendant was conferred by verbal agreement of the plaintiff, the defendant, and a third person, which agreement was never reduced to writing, that the plaintiff could not recover. The jury found for the defendant.

H. R. HUNT, for plaintiff in error.

BROWNE & PUTNAM, for defendant in error.

Separate opinions were filed by the members of the court.

HALLETT, C. J.

In England, and in this country, it is considered that the right of one person to conduct water over the land of another is an interest in real estate, which must be conveyed by deed in compliance with the terms of the Statute of Frauds. In countries where the humidity of the climate is sufficient to supply moisture to plants, there can be no reason for distinguishing this from other easements in the soil, and therefore the law of England and of most of our States on this point will be found in the general rules relating to real property.

The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this Territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length and rarely within the lands of a single proprietor. A riparian owner must usually get his supply of

water from some point on the stream above his own land, and he is compelled to enter upon the lands of others in order to obtain it. Irrigating ditches can not be made available at or near the head or point of divergence from the stream, and, while a riparian owner may be able to construct a ditch upon his own territory, which shall overflow a portion of his land, he can never make it serviceable to the entire tract. Of course, lands situated at a distance from a stream can not be irrigated without passing over intermediate lands, and thus all titled lands, wherever situated, are subject to the same necessity. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provision for this necessity, by withholding from the land owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water. It was enacted by the first legislative assembly, that persons owning claims on the bank, margin or neighborhood of any stream, should have the right of way over adjacent lands for purposes of irrigation: Laws 1861, p. 67; and this law is still of force: Rev. Stat. 363. So, also, the common law recognizes an easement in certain cases, and will imply a grant of such easement where it is especially necessary to the enjoyment of the dominant estate: Phear on Rights of Water, 71.

If one having a close, surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land as incident to the grant, for, without it, he can not derive any benefit from the grant. So it is, also, where he grants the land and reserves the close to himself: 1 Wm. Saund. 323, note 6; *Pennington v. Gulland*, 9 Ex. 9; *Snyder v. Warford*, 11 Mo. 513.

And if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto: Phear on Rights of Water, 72; *Pheysey v. Vicary*, 16 M. & W. 484; *Pyer v. Carter*, 1 H. & N. 916. In these cases it is true

the dominant and servient estates were derived from a common source, but in this they are analogous to the case at bar. All the lands in this Territory which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them fruitful.

"Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong. They are always presumed, and must be presumed to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force." *West River Bridge Co. v. Dix*, 6 How. 532.

When the lands of this Territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them. It may be said, that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands; and this servitude arises, not by grant, but by operation of law.

In this case there was evidence tending to prove that defendant consented to the construction of the ditch, which, with the aid of the law, was sufficient to maintain the action. If defendant had refused his consent, the statute prescribed the method of proceeding to perfect plaintiff's right. But, in any event, it was not necessary that defendant should convey to plaintiff the right of way for the ditch, and therefore the charge to the jury was erroneous.

I think that the judgment should be reversed, and that a new trial should be awarded.

BELFORD, J.

Yunker sued Nichols in the court below, in an action on the case to recover damages for cutting a certain ditch which

had theretofore been constructed on Nichols' land, and for diverting the water therefrom. The declaration contains three counts. It is averred that Yunker, at the commencement of this action, and for a long time anterior thereto, was the owner of a certain tract of land lying from one to two miles distant from a certain stream known as Bear Creek. It is further averred that plaintiff had no facilities on said land for irrigating purposes. It is further alleged that the defendant and one John Bell, John McBrown and Peter Olsen, respectively, claimed certain tracts of land lying between the land of the plaintiff and the stream above mentioned. That on the first day of March, 1871, the plaintiff and the said defendant and Bell, not having water facilities on their lands for the purpose of irrigation, built and constructed a dam in said stream of water, adjacent to the land of McBrown, and procured from McBrown and Olsen the right of way across their land, and dug and constructed a certain ditch, and conducted water therein from the dam to the respective lands of Bell and Nichols and the said plaintiff, for the purpose of using the same in irrigating and making said lands available for agricultural purposes. That by mutual agreement, the water running through the ditch was to be used, share and share alike, by the parties, each of the parties having the right to divert from said ditch onto their respective tracts one third of the water. It is further alleged that, notwithstanding this agreement, and after the ditch was constructed and the water let in, the defendant, wrongfully and unjustly intending to injure the plaintiff and deprive him of the use of the water, not only diverted a larger quantity of it than he was entitled to, but prevented any portion of it from reaching plaintiff's land, and prevented the plaintiff from using the ditch; wherefore great damage had accrued, etc. The defendant filed the general denial. The cause was submitted to the jury for trial, who returned a verdict for the defendant. There was no evidence introduced on the part of the defendant, and that of the plaintiff fully sustained the allegations of the declaration. The court gave the jury the following instructions, which are assigned for error.

"If the jury believe from the evidence that the right to have water flow over the lands of the defendant and to the lands of

the plaintiff, for the interruption of which this action is brought, was conferred by a verbal agreement of the parties, or the verbal agreement of the plaintiff and defendant and a third person, which agreement was never reduced to writing, and that the plaintiff had no other right to such flow of water than such verbal agreement, then, although they should believe from the evidence that the plaintiff actually constructed said ditch, and expended labor and money on the faith of such agreement, and that the defendants actually diverted the water, as charged in the declaration, they must find defendant not guilty."

"The jury can not find for the plaintiff unless they believe from the evidence that the right which plaintiff claims, to have water flow over the land of defendant, and for the obstruction of which right this action is brought, was given by deed of the defendant to plaintiff. If plaintiff's only title to the flow and use of the water was a verbal agreement or consent of the defendant, the plaintiff has no case."

The principle involved in this case has certainly received a large degree of attention both in this country and in England; and it is to be deeply regretted that those courts which appear to have given it the greatest consideration, have failed to preserve any rule of uniformity in their decisions. A broad distinction seems to be taken between a license which is executory, and one that has been executed; and in many instances, the principle of estoppel has been made available in avoiding the recognized force of the Statute of Frauds. In some of the States a license to dig a ditch and flow water therein over the land of another is held not to be such an interest in the realty as requires the right to be evidenced by deed; in others, a contrary rule is expressly announced, and licenses of this character are held to be always revocable at the will of the licensor. I apprehend that much of the confusion which obtains on this subject arises from a failure to keep steadily in view the distinction which unquestionably exists between a mere license and a grant. In speaking of this subject, VAUGHAN, C. J., says: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, had been unlawful; as a license to go beyond the seas, to hunt in a man's park, to come

into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to acts of hunting and cutting down the tree; but as to carrying away of the deer killed and the tree cut down, they are *grants*."

In courts where this distinction has been taken, it has been held that the right to overflow the land of another is an easement, an incorporeal hereditament, and it is an interest in real estate. Title to such easement must be conveyed by grant and established by proof of an actual grant, or by proof of a prescription, from which a grant will be inferred. And if the mode of proof adopted be the showing of an actual grant the grant must, at least, under the Statute of Frauds, be in writing, by deed; and the same doctrine has been specially applied to a ditch constructed through the land of another: *Morse v. Copeland*, 2 Gray, 305; *Selden v. Delaware and Hudson Canal Co.*, 29 N. Y. 635; *Foster v. Browning*, 4 R. I. 47; *Foster v. N. H. & N. Co.*, 23 Conn. 228. Our attention, however, has been particularly called to the decisions which have been made on this subject in Maine, New Hampshire, Ohio, Iowa and Indiana, and I have endeavored to give them a most careful and critical examination. *Ricker v. Kelly*, 1 Greenl. 117, was an action of trespass for cutting down and destroying part of a wooden bridge, the property of the plaintiffs. The defendant, in justifying, pleaded that the bridge was erected on the land of Kelly without his license and against his will, and that he removed it, as he lawfully might do.

The plaintiffs replied that, on a certain day, in consideration of their promise to perform certain work, which was accordingly performed for Kelly, he gave them a license and authority to erect a bridge on his land, and to have a right of way over the same to the bridge; that, by virtue of said license, they erected the bridge, etc. To this replication the defendants demurred, because the plaintiffs had not set out any legal conveyance of title to them to build their bridge, nor to enter upon or pass over the land for any other purpose, and because it did not appear that said license was in writing, nor

how long it was to continue in force. *Held*, by the court, that the replication was good and the action maintainable. MELLEN, C. J., after referring to the allegation of the defendant that the claim of the plaintiffs was an interest in the close, within the meaning of the Statute of Frauds, and the proof of this interest not being in writing, the permission of the defendant to the plaintiffs to enter upon the close and build said bridge and enjoy a right of way over the close to the said bridge, is void and ineffectual, says: "In the present case the plaintiffs placed their own materials, in the form of part of a bridge, on the defendant's land by their express consent, and if a right of way over the close to the bridge did not pass by parol, still the defendant had no right to seize and carry away the plaintiffs' property and destroy its value. As well might the owner of a ship yard permit another to build a ship in it, and when the ship was on the stocks, cut it in pieces and carry it away with impunity," and this really appears to be the controlling principle in that decision. True, the judge holds that the permission having been acted upon, the case was thereby taken out of the operation of the Statute of Frauds. But if we concede that this decision is made to rest on this latter ground, then the case can no longer be regarded as authority in that State for the reason that *Pitman v. Poor*, 38 Me. 237, silently overrules it, and holds that no permanent interest in real estate can be acquired by a parol agreement, and that the parol license that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir of water for the use of his mill, will confer no right upon the plaintiff to maintain such dam after it is built, or control the water raised by means of it. This is the last utterance on the subject by that court, so far as I am informed, and must be taken as the established doctrine of that State.

The first case in New Hampshire is that of *Woodbury v. Parshley*, 7 N. H. 237. That was an action on the case. The declaration alleged that the plaintiff was seized of a meadow adjoining a certain pond, and that the defendant, by means of a dam erected by him upon his own land, caused the water to overflow and injure the meadow of the plaintiff. The defendant introduced evidence showing that the dam had been erected by the mutual agreement of the parties. The

plaintiff objected to the admission of parol evidence to prove such agreement, but the evidence was admitted. The court, after holding that the evidence was rightly admitted, says: "The dam was erected by the defendant at his own expense, with the assent of the plaintiff, for the benefit of both. And here the first question is, whether, under the circumstances, the license was revocable at the will of the plaintiff. The defendant had incurred expenses in erecting the dam. The license had been executed and acted upon. Certainly the plaintiff could not revoke it without tendering to the defendant the expenses that had been incurred in the project."

In *Ameriscoggin Bridge v. Bragg*, 11 N. H. 108, the court say: "It is contended further, that the license to erect a bridge on defendant's land can not be shown by parol testimony, on the ground that it is a permanent easement in the land, with a right at all times to enter and enjoy it, and that such an easement is within the Statute of Frauds and can be sustained only by evidence in writing. The distinction between a privilege or easement carrying an interest in land, and requiring a writing within the Statute of Frauds to support it, and a license which may be by parol, is said, by Chancellor Kent, to be quite subtle, and that it is difficult in some of the cases to discern a substantial difference between them. A license to an individual to do an act beneficial to him, but requiring an expenditure upon another's land, is held not to be revocable after it has once been acted upon. Such a license is a direct encouragement to expend money, and it would be against conscience to revoke it as soon as the expenditure begins to be beneficial." In *Sampson v. Burnside*, 13 N. H. 264, it is held that a parol license to enter on land and lay down aqueduct logs for the purpose of carrying water from a spring to adjoining land, with license to enter from time to time to examine and repair the same, is not a sale of land or an interest in land within the Statute of Frauds. Whether the license in such a case is revocable or not, is regarded as an open question. In the case of *Houston v. Laffer*, 46 N. H. 507, which very strongly resembles the case at bar, the earlier decisions on this subject in that State are all noticed, and, if not directly overruled, their authority is greatly impaired. After alluding to these cases the court say: "But we think

the more recent decisions, however, sustain the doctrine that the license is, in all cases, revocable, so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned. To hold otherwise would be giving to a parol license the force of a conveyance of a permanent easement in real estate; such a doctrine can not be sustained. No such right or interest in real estate can be created by parol." It is evident, therefore, from the later cases, both in Maine and New Hampshire, that a clear departure has been taken from the doctrines announced in the earlier reports, and a tendency has set in to conform to the line of decision pursued in a majority of the States. In Ohio the court has steadily adhered to the doctrine that a parol license, when executed, is irrevocable, and that an action of trespass is maintainable against the licensor for any unjust interference with the rights of the licensee: *Wilson v. Chalfunt*, 15 Ohio, 248.

In Iowa, *Wickersham v. Orr*, 9 Iowa, 260, the irrevocability of an executed parol license is made to rest on the ground that when money or labor has been expended on the land of another, upon the faith of a promise given by him, the owner shall not assert his legal right to the soil so as to interfere with that use or enjoyment of the thing which has resulted from such promise by the money and labor of the licensee.

In *Beatty v. Gregory*, 17 Iowa, 109, it is held that a parol license which has been acted upon, and which has led to the expenditure of money and labor, can not be revoked until compensation for such expenditure has been made. Taking this last case as modifying the principle announced in the former, we have the courts of two States, Ohio and Pennsylvania, adhering strictly to the doctrine of the irrevocability of an executed license, while in all the other States as well as in England (*Wood v. Leadbitter*, 13 M. & W. 838), licenses of this character are held to be revocable at will, as being in contravention of the Statute of Frauds. Viewing the instructions given by the judge below, to the jury, as the announcement of doctrines which should govern a court of law in the administration of purely legal principles, I am not prepared to dissent from them, but, while I yield to them that measure of homage so fully accorded by others, I can not shut my eyes to the fact that it is doing violence to every principle of justice

to allow a statute designedly passed to cut off and prevent frauds, to be converted into an instrument whereby they may be practiced and fostered. That which was originally intended as a shield and defense for rights should never be permitted to become a means of assault for their overflow. Courts of equity, which constantly adapt themselves to the progress of society and civilization, and whose principles accumulate with the experience of ages, have certainly blunted the sharper edges of the Statute of Frauds, and evolved a doctrine in every respect more consonant with the interest of society, namely, that he who, by his admissions or conduct, induces another to act, can not afterward be permitted to assert the contrary to the injury or prejudice of the party who has already acted upon the faith and in the belief created by him, and all the courts concur in holding that an estoppel *in pais* exists, when a party makes a statement to another which that other relies and acts upon, and which it would be a fraud in the party making the statement to afterward controvert, so far as the statement affects the other's pecuniary rights. It can not be denied that the common law has, in a great measure, accommodated itself to this doctrine of estoppel, especially so far as it affects personal property, and its application in matters of that nature is constant; nor is it wanting in examples in relation to real estate. So great a jurist as Lord MANSFIELD would not suffer a man to recover even in ejectment when he had stood by and seen the defendant build on his land. And in the case of *Heane v. Rogers*, 9 B. & C. 577, Mr. Justice BAILEY said, that under the same circumstances he would apply the same doctrine. Mr. Justice BULLER, in the case of *Farr v. Newman*, 4 D. & E. 636, remarks: "That when a rule of property is settled in a court of equity, and there are no decisions against it at law, I am as ready as any man to follow the line of equity, for I think it absurd and injurious to the community, that different rules should prevail in different courts on the same subject." And to the same effect is the language of Lord ELDON in *Smith v. Doe*, 7 Price, 509. In the case of *Shaw v. Bebee*, 35 Vt. 208, the principle of estoppel was applied. That was an action of ejectment. The court say: "We are aware that there have been decisions questioning the extension of this doctrine of estoppel *in pais* to affect the title to lands.

But a review of the decisions shows that the great weight of authority is consonant with the views we have here expressed. All concur that such facts constitute an estoppel as to personal property, and upon reason and principle, to prevent fraud and promote justice, the same rule should be extended to real property." It is also true, that the common law courts of Pennsylvania have adopted it; and they have adopted many other principles which had first received their sanction in courts of equity: *Wentz v. Dehaven*, 1 Serg. & Rawle, 312. The same principle was applied in *Corbet v. Norcross*, 35 N. H. 115, and in *Heard v. Hall*, 16 Pick. 457, and in *White v. Patten*, 24 Id. 324.

In the State of Nevada they have yielded to the force of the same doctrine, as will be seen from the case of *Sharon v. Minnock*, 6 Nev. 389; so also in California, *Kelly v. Taylor*, 23 Cal. 11; 5 Id. 84, and 8 Id. 44.

In *Snowdon v. Wilds*, 19 Ind. 14, the court say: "But though a parol license, amounting, in terms, to an easement; is revocable as to future enjoyment at law, and is determined by a conveyance of the estate upon which it was enjoyed, this is not the rule in all cases, in courts of equity. In these courts the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at all events, when adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel and fraud, and the specific performance of a partly executed contract to prevent fraud. And in those States where law and equity are administered in the same court, relief is afforded in any given suit when the pleadings present the necessary averments." When courts of law so freely apply this principle in regard to personalty, it is difficult to comprehend why any hesitation should exist in its application to real estate. What would be justice in one case would be equally so in the other, and in equity it is accordingly admitted; and why should it not be so at common law? It may be said, however, that the distinction between law and equity is maintained in this Territory. That is true only in a qualified sense. The same officer administers both, and at the same term of court, and to me it seems strange and preposterous for the same judge to

turn the party out of his court one day to enable him to avail himself of a well known, well defined and well settled rule in jurisprudence, as applicable in a rational point of view to proceedings in one tribunal as in those of another, especially when, as in this Territory, the very court which is to decide in equity is the same tribunal. It can not be controverted that, under the facts set forth in the declaration, Yunker would be entitled, in a court of equity, to a remedy that would secure him in the enjoyment of the ditch and the water flowing therein. Would a court of equity also compensate him for the damages which he has sustained by reason of the unjust interference of Nichols? Then it would be invading the domain of the law, and setting itself up as the measurer of damages; a comfortable and assuring spectacle indeed, when the same judge had, the day before, declined, for reasons of grave public policy, to invade the domain of equity. If the court should, however, feel unable to award compensatory damages, Yunker would be remediless, for the affirmance of the judgment below would bar his right of action, although the deed which the court of equity would require Nichols to make might be adjudged to take effect from the date of the construction of the ditch.

In the notes to Smith's Leading Cases, Vol. 2, p. 762, (6th Am. Ed.), the learned annotators say: "It would, therefore, seem too late to contend that the title to real estate can not be barred by matter *in pais* without disregarding the Statute of Frauds, and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in chancery, and no redress could be had in the courts of common law unless under rare and exceptional cases. But the common law has been enlarged and enriched with the principles and maxims of equity, which are constantly applied at the present day in this country and in England, for the relief of sureties, the protection of mortgagors and the benefit of purchasers, by a wise adaption of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is derived from the courts of equity, and as those courts apply to every species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary

whatever be the nature of the interest at stake, and it would seem that, whether the controversy be in equity or at law, there is nothing in the nature of real estate which should deprive it of the benefit of those wise and salutary principles which are now applied without scruple, in both jurisdictions, in case of personalty. And whatever may be the wisdom of the change which has broken the barriers by which the doctrine of equitable estoppel was formerly excluded from legal tribunals, it has now gone too far to be confined within any limits less than the whole field of jurisprudence." *Buckholler v. Edwards*, 16 Ga. 593.

It seems to me, after the doctrine has received the sanction of such courts as those of Maine, New Hampshire, Pennsylvania, Georgia, Ohio, Indiana, Iowa, Nevada and California, we can run no serious risk in applying its benefits to the property within our borders. If the foregoing views are in any measure open to objection, still another reason exists which imperatively demands the reversal of the judgment below. At an early period in our territorial history, the legislature, keenly alive to the wants and necessities of our people, enacted a law on the subject of irrigation, the provisions of which were designed to secure to all persons who claim, own or hold a possessory right or title to land within the boundary of Colorado, when those claims are on the bank, margin or neighborhood of any stream of water, the use of the water of said stream for the purposes of irrigation and making said claims available, to the full extent of the soil, for agricultural purposes; and further providing that, when the land so held or owned is removed from said stream of water, the owner or claimant shall be entitled to a right of way through the farms or tracts of land which lie above and below him on said stream, for the purposes above stated. The constitutionality of this law is, however, assailed, and it becomes necessary to pass upon it. To avoid acknowledging the fact that constitutions sometimes surrender to the force of necessity, the general opinion obtains that courts and legislatures are justified in presuming that, within the scope and spirit of wise, august instruments, every power may be found, the exercise of which is essential to the public welfare.

If the warrant for performing an act, justly esteemed indis-

pensible to the public prosperity is not found in an express grant, then the authority finds lodgment in the implied powers of the constitution; for whenever the end is required the means are authorized, and whenever a general power to do a thing is given, every particular power necessary for doing it is included. It would be almost impracticable, if it were not useless, to enumerate the various instances in which Congress, in the progress of the government, has made use of incidental and implied means to execute its powers; they are almost infinitely varied in their ramification and details: 2 Story on Const., § 1258. One of the most important interests of this Territory is the agricultural interest. This can only be fostered and nourished by a system of irrigation, and the right to legislate on this subject seems to me clear and unquestionable. If then, the agriculture is essential to the well-being of this Territory, and can only be developed by a system of irrigation, it seems to me a matter of absolute necessity that the legislature should have power to pass needful laws whereby the great body of land lying within our boundaries should be made available—and that necessity confers a right to pass such laws, I will endeavor to demonstrate. No such power as that of selling lands for the non-payment of taxes is to be found in the revealed, natural, civil or common law. But there are analogous powers to be found in the common law code and in the statute law of every civilized nation; for example, the power to condemn land for public uses, and the other cases where power is exercised over the estates of citizens, such as the sale of lands for the payment of the debts of owner. The taxing power has no existence in a state of nature. It is the creature of civil society; government begets its necessity. There must be interwoven in the frame of every government a general power of taxation. Money is with propriety considered as the vital principle of the body politic, as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must

necessarily ensue: either the people must be subjected to continual plunder, or the government must perish for want of revenue to support it. It may therefore be laid down as a principle of universal constitutional law, that the power to levy taxes is incident to sovereignty, without which no government could exercise the powers expressly delegated to it: Blackwell on Tax Titles, 8-39; *Pasham v. Decatur County*, 9 Ga. 352.

If, therefore, the right to raise revenue and to sell land for the payment of taxes is made legal and constitutional by virtue of the necessities of society and government, what tenable objection can be made to the validity of a law which, taking note of an imposing public necessity and the physical conditions of our Territory, accords to all persons engaged in agricultural pursuits a right of way over lands lying between their possessions and a stream of water?

Is not the necessity in this particular instance quite as imperative as in the other?

Every member of society is presumed to have assented to the public law by which his right of property is subjected to the dominion of strangers. The manner in which this power is to be exercised is specified in the law. The same law which creates this power bridle its execution. You may take my property to pay my debts, but you must ascertain that debt by judgment, and a sheriff must execute the power. You may take my land to build a railroad, but you must pay me the value of it. And hence, while it may justly be said that a party has an unquestionable right, owing to the necessities of the country, to construct a ditch over the land of another, independent of any special law on the subject, yet the legislature, as the representative of that society into which each citizen enters, and in the entering of which he sacrifices so much of his rights for the purchase of social protection, may prescribe the method, terms and means whereby that right to construct the ditch shall be exercised. Of course these legislative provisions may be waived by the parties, as was done in this case. The construction of a ditch for irrigating purposes seems to me to rest on principles analogous to those which sustain the right of a private way over the land of another.

In *Parker v. Webster*, 2 Sid. 39, decided in Cromwell's time, it appeared that A had three parcels of land, and there was a private way out of the first parcel to the second, and out of the two first parcels to the third; and B purchased all these parcels, and sold the two first to C. There was no way to the land not sold but through the other two parcels, and the court adjudged that the way continued from necessity, and that the party was not liable in trespass for using it. In the case of *Snyder v. Warford*, 11 Miss. 513, the court held that a right of way of necessity exists in all cases in which an individual owns lands surrounded by other lands excluding it from any public highway, and the case is made to rest upon the good and salutary principle that the right of a man in the use of his property is restricted by a due regard to the equal rights of others. The judge says: "It would seem to be no more than a principle of natural justice that his right of way should exist, although its existence may, to some extent, interfere with the absolute dominion of the conterminous proprietors. If not a principle of natural law, it is at least one which could not long be omitted in the code of a civilized people." See 3 Kent's Com. 423, marginal; *Holmes v. Seely*, 19 Wend. 507; *Capers v. Wilson*, 3 McCord, 170; *The People ex rel. Cook v. Nearing*, 27 N. Y. 306.

I am fully aware that courts should be slow to justify their decisions on the ground of necessity; but I am equally conscious of the fact that they will betray their trust if, in the administration of law, or in the expounding of constitutional principles, they shut their eyes and refuse to recognize those conditions of society which call into force and operation principles whose existence and recognition can not be disregarded without bringing ruin on all. As has been well said by another, the law is not a system marked by folly, based on bald sentences, without reason; it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interests of society and civilization. And so believing, I think the instructions given were erroneous, and that the judgment should be reversed and the cause remanded.

WELLS, J.

I concur in the conclusion that the judgment given in the court below must be reversed, but, in so far as this conclusion is based upon a supposed estoppel, I dissent from what my brother Belford has said; and, in so far as it is sought to rest it upon the statute concerning the irrigation of lands, I dissent from both my associates.

I conceive that, with us, the right of every proprietor to have a way over the lands intervening between his possessions and the neighboring stream for the passage of water, for the irrigation of so much of his land as may be actually cultivated, is well sustained by force of the necessity arising from local peculiarities of climate, as in other countries, out of a like necessity, every proprietor has a way of right to his own close over the premises which shut it from the highway. But it appears to me that this right must rest altogether upon the necessity rather than upon the grant which the statute assumes to make, for in other countries, where the necessity does not exist, the right has not been recognized in the courts, nor attempted to be confirmed by statute; and where similar legislation has been attempted, in the instance of private ways, by statute, it has been held to be either void as an appropriation of private property to individual uses (*Taylor v. Porter*, 4 Hill, 140; *Osborn v. Hart*, 24 Wis. 89), or else has been sustained as the regulation of an existing right, and not as conferring one: *Snyder v. Warford*, 11 Mo. 513.

It seems to me, therefore, that the right springs out of the necessity, and existed before the statute was enacted, and would still survive though the statute were repealed.

If we say that the statute confers the right, then the statute may take it away, which can not be admitted.

Doubtless the exercise of the right may be regulated by statute, but that is not the question here; and it appears to me unnecessary to determine the validity or effect of the existing legislation.

Reversed.

WESTON V. ALDEN.

(8 Massachusetts, 136. Supreme Judicial Court, 1811.)

¹ **Irrigation recognized at common law.** The owner of a close may lawfully use the water of a brook bounding his close, for husbandry, by making small sluices for the purpose, and if the owner of a close is damaged thereby, it is *damnum absque injuria*.

This was a special action of the case against the defendant for diverting an ancient watercourse which passed through the plaintiff's close, and by which it was fertilized, so as to produce annually a large crop of grass.

The cause was tried before the chief justice, upon the general issue, at an adjournment of the last October term in this county, and a verdict found for the plaintiff, by the consent of the parties, subject to the opinion of the court upon the following report of the judge who sat at the trial.

It was proved that there was an ancient brook of running water, as described in the declaration; and that the plaintiff was seized of the close therein mentioned; and that this watercourse first passed by the defendant's meadow, which was bounded on it; that in its natural course it passed by several meadows belonging to persons not parties to the action, and then passed by the plaintiff's meadow, as alleged in his declaration; that the defendant, claiming a right to divert the water for any purpose as he pleased, in fact cut several sluices in the bank of the watercourse, in his own land, that he might, with the water passing through those sluices, irrigate his own meadow; that the water thereby passed onto the defendant's meadow, through those sluices, but afterward passed into the same brook above the plaintiff's meadow, except such part as was absorbed in the defendant's meadow, or evaporated; and that so much of the water was absorbed in the defendant's meadow, or evaporated, in consequence of the sluices so opened by him, that less water than usual came to the plaintiff's meadow; by reason of which his said meadow was greatly damaged, the quantity of grass produced thereon being materially diminished.

¹ *Greenslade v. Halliday*, 6 Bing. 379.

If upon these facts the defendant had a legal right to divert the water from the said ancient watercourse, for the purpose and in the manner aforesaid, the verdict was to be set aside and a new trial granted; otherwise the verdict was to stand, and judgment to be entered accordingly.

The action was continued *nisi* for the opinion of the court upon the foregoing report; and at an adjourned session of the last March term in Suffolk, present the Chief Justice, and SEWALL and PARKER, Justices, the opinion of the court was pronounced to the following effect:

We think upon the facts reported in this case, that the plaintiff has no right of action and that the verdict must be set aside. A man owning a close in an ancient brook may lawfully use the water thereof for the purposes of husbandry as watering his cattle, or irrigating the close; and he may do this either by dipping water from the brook and pouring it upon his land, or by making small sluices for the same purpose; and if the owner of a close below is damaged thereby, it is *damnum absque injuria*.

New trial granted.

¹ARNOLD V. FOOT.

(12 Wendell, 329. Supreme Court of Judicature of New York, 1834.)

Instance of the common law rule applied to irrigation. Where a *spring* of water rises upon the land of one owner and from it runs a *stream* onto the land of another, the owner of the land upon which is the spring has no right to divert the stream *from its natural channel*, although the waters of the stream are not more than sufficient for his domestic uses, his cattle, and for the irrigation of his land.

Prescription. The right to divert water from its natural channel under the common law or the civil law, can be acquired by prescription only.

Error from the Livingston Common Pleas.

Arnold sued Foot in a justice's court, and declared against him for placing obstructions and thereby diverting a stream of water from its natural channel, and preventing it from

¹ *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391.

flowing in and upon the plaintiff's land. The defendant pleaded not guilty, and accompanied his plea with a notice that on the trial of the cause he would prove that the source of the waters of the stream which he had obstructed was on his own land, and that he had obstructed the stream no further than what was necessary for the use of his cattle and the irrigation of his lands. On the trial the following facts appeared: The parties own adjoining farms; on the farm of the defendant, within five or six rods of the land of the plaintiff, there is a living spring, the water from which in its natural channel flows to and upon the land of the plaintiff, and has so run for about twenty years. Immediately after coming upon the land of the plaintiff it is received in a watering place for cattle, dug for that purpose, and from thence flows over the pasture and meadow of the plaintiff. The spring is near the dwelling house of the defendant and is used by him for domestic purposes and for watering his cattle. About the 20th April, 1831, the defendant plowed a furrow below the spring and thereby diverted the water from its natural channel, and caused it to flow upon his own meadow to the extent of three or four acres. Soon after the diversion of the water, to wit, on 3d May, the plaintiff commenced his suit. It was shown that the furrow made to divert the stream is not more than eight or ten rods in length, and that at its termination the water soaks into the ground, causing it for several rods round to be quite wet. Puddles of water are also observed on the plaintiff's meadow, near the boundary line between the two farms, supposed to proceed from the termination of the furrow. The defendant proved that no more water runs from the spring than what is wanted for his domestic purposes, for his cattle and for the irrigation of his land. There is quite a current, but the stream is small, and in the summer season it does not run upon the plaintiff's land more than ten rods. The justice gave judgment for the plaintiff for one dollar and seventy-five cents damages, besides costs. The Common Pleas of Livingston on a *certiorari*, reversed the judgment of the justice, and the plaintiff below (Arnold) sued out a writ of error.

J. YOUNG, for plaintiff in error.

C. H. BRYAN, for defendant in error.

By the Court, SAVAGE, Ch. J.

The doctrine of the common law in respect to the use of running water is nowhere better expressed than by Chancellor Kent, in his Commentaries, 3 Kent, 439. Every proprietor of lands on the bank of a river has an equal right to the use of the water which flows in the stream as it was wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him. He has no property in the water itself, but a simple usufruct while it passes along. He may use the water as it runs in its natural channel, but he can not unreasonably detain it, or give it another direction. He can not divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Streams of water are intended for the use and comfort of man, and every proprietor is entitled to a reasonable use of the water, and may apply it to domestic, agricultural and manufacturing purposes; but not so as to destroy or materially diminish or affect the application of the water by the proprietors below the stream. Although each proprietor through whose lands a stream flows has a right to the use of the water in its natural channel, he may not use it to the prejudice of another. In the language of Mr. Justice Story, "The natural stream existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed to the land itself." 4 Mason, 400. The use of the water for culinary and agricultural purposes implies a diminution of it, but this use must be with the least possible injury to others interested in the same stream.

In the case now before the court, the water from the spring in question was wont to run *currere solebut*, in a direct line into the plaintiff's premises. This was the direction given to it by Providence; it was intended to water the land immediately below the spring, and it must continue to water that land no matter who may be the owner. The defendant has a right to use so much as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow, if thereby

he deprives the plaintiff of the reasonable use of the water in its natural channel. The evidence shows that the defendant has appropriated the whole water to his own use, and he seems to suppose that he possesses that right. Such, also, must have been the opinion of the Common Pleas—and in this consists the error. The general principle laid down by Lord ELLENBOROUGH in *Bealey v. Shaw*, 6 East, 214, is this: "The general rule of law, as applied to this subject, is, that independent of any particular enjoyment used to be had by another, every man has the right to have the advantage of a flow of water in his own land, without diminution or alteration." This proposition has often been quoted with approbation and adopted by this court, and recently in the case of *Crooker v. Bragg*, 10 Wendell, 264. The case of *Brown v. Best*, 1 Wils. 174, was in some of its circumstances much like the present and fully exemplifies the principle. The plaintiff declared upon his possession of the land through which the water used to run, and set out the course thereof, and averred that the defendant obstructed it by digging pits and making ponds, by which the water was diverted and sunk so that no water came to the plaintiff's grounds. The defendant pleaded that all the water sprung in his ground; that two pits had been there time out of mind, for the use of water for the meadows and cattle; that at the time when, etc., those pits were choked up with mud, and therefore he dug two large pits and made dams and banks, which he insisted it was lawful for him to do. That case and this are just alike, except that in that the defendant claimed a right by prescription to have two large pits full of water, which is not pretended in this case. The question there arose upon demurrer, as to the sufficiency of the defendant's plea. Chief Justice LEE held the declaration right, and that the plea admits the existence of the watercourse, and acknowledged that the defendant had enlarged the pits. This the Chief Justice said really amounted to a confession of the plaintiff's action; for though there might have been pits on the defendant's ground time out of mind, yet he could not enlarge them, but they must remain as they always had been; and such, he said, is the rule both in common and civil law. The whole court concurred in giving judgment for the plaintiff. That case shows

what was meant by Lord Ellenborough by the expression independent of any particular enjoyment. The particular enjoyment was the right to fill the two pits. The defendant had used the water in that way time out of mind, and therefore had a prescriptive right to that use besides the natural use of the stream. So if the plaintiff in this case had submitted for twenty years to the defendant's appropriation of the water of the spring, by diverting it from the natural channel and carrying it in a different direction, his right would be gone; and but for the prospective right set up in *Brown v. Best* the defendant would have no right to fill those pits. The court decided that he had no right to dig new pits. The defendant in this case, by plowing furrows and thus diverting the water from its natural channel, has done the same thing which the defendant in that case did by digging new pits; and in both cases the consequence is the same—the soakage of the water into the defendant's ground, whereby the plaintiff is deprived of the use of it. The defendant had no such right, and the plaintiff has sustained damage. The action therefore lies.

Judgment of Common Pleas of Livingston reversed with costs, and judgment of the justice affirmed.

THORP V. WOOLMAN.

(1 Montana, 168. Supreme Court, 1870.)

Apportionment of water by commissioners, void. The powers conferred upon the commissioners authorized to be appointed for the apportionment of water when the supply is not sufficient to meet the continual wants of all appropriators, under "An act to protect and regulate the irrigation of land in Montana Territory," approved January, 1865, are clearly judicial, and the acts of such commissioners are without authority of law, and void.

Right of appropriation limited by statute.—The statute referred to recognizes the right of appropriation of water for irrigation, limiting it, however, to persons owning land upon the banks of the stream from which the same is taken, and also limiting the quantity he can appropriate to what is necessary to irrigate his land.

¹ **Prior appropriation.** He who first locates land and appropriates water to

¹ *Simpson v. Williams*, 4 West C. R. 530; *Irwin v. Strait*, Id. 582.

irrigate the same, is entitled to enough to irrigate his land; he who is first in time is first in right.

Appeal from the Third District, Lewis and Clarke County.

In this action, Thorp and Woolman filed their agreed statement of facts in the District Court for Lewis and Clarke county, on March 14, 1870. The attorneys of the parties also filed a stipulation "that the above agreed statement is made with reference to the settled customs and usages of Montana Territory, of which we desire that the court shall take judicial notice." On June 10, 1870, the court, SMITH, J., signed a decree in favor of Thorp, and Woolman appealed.

Section 4 of the act approved January 12, 1865, which is referred to by counsel and the court, is as follows:

"SEC. 4. That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all."

The opinion contains the other facts.

SHOBER & LOWRY, for appellant.

WOOLFOLK & TOOLE, for respondent, who was plaintiff below.

KNOWLES, J.

This cause was presented to the court below on an agreed statement of facts. It appears, from this, that the respondent and appellant each owned a ranch on Prickly Pear creek. That of the appellant's was higher up the creek than that of respondent's. The respondent first located his ranch, and, at the same time, claimed three hundred inches of water in this creek for the purposes of irrigating his land. In 1869, owing to a drought, this was all the water there was in this creek, and this much was necessary to irrigate the land of respondent. The appellant then applied to the nearest

magistrate, in accordance with the provisions of "An act to protect and regulate the irrigation of land in Montana Territory," approved January, 1865, for the appointment of three commissioners to apportion what water there was in the creek between him and respondent. This commission met and awarded one half of the water to appellant, leaving the respondent the other half.

The respondent asks a decree against the appellant for three hundred inches of water. The case may be said to be an action to quiet title, presented to the court upon these facts. The court below gave judgment to the respondent for three hundred inches of water. From this judgment the appellant appeals to this court.

The first question presented is this award of the commission. The powers given this commission by the act under which they conducted their proceedings are clearly judicial. They are empowered by it to apportion the waters in a just and equitable proportion. This required them to determine what was just and equitable between these parties. In the next place the apportionment was to be made with a due regard to the legal rights of all. This required of them to determine what these legal rights were. The Organic Act of this Territory, which is its fundamental law, limits the powers of legislation, vests judicial power in a Supreme Court, district courts, probate courts, and in justices of the peace. No tribunal which does not belong to one of these classes is legal. As this commission can not claim to belong to either one of these, it was a tribunal exercising judicial authority without legal warrant, and its acts are void. The appellant gained no rights whatever by virtue of this award.

It is not necessary for the court to determine in this case, whether or not the doctrine of appropriation applies to ranchmen as well as to miners, concerning water rights, for the statement of facts shows that the ranch of appellant was above that of the respondent, and that at the time this dispute arose three hundred inches of water was flowing down the creek by appellant's ranch, which clearly indicates that the water had not been taken out of the creek above it. As a riparian proprietor the respondent would be entitled to have the waters of the creek flow down its accustomed and natural channel un-

diminished in quantity, and below appellant's ranch could divert the same for purposes of irrigation as against him. The counsel for appellant, in their brief, say they claim their rights by virtue of the above statute. There are many reasons for holding that this very statute recognizes or establishes the doctrine of appropriation of water for irrigation, limiting, however, the right to appropriate to persons owning land upon the banks of the stream from which the same is taken, and also limiting the quantity of water he can appropriate to what is necessary to irrigate his land. The permission given by that act to take water out of its natural channel for purposes of irrigation, where it damages landholders below the point where the water is diverted, is incompatible with the common law doctrine in the case of riparian proprietors.

Section 4 of the act I do not think, in any way, militates against this view. Any tribunal, governed by the established principles of law, making an apportionment of water in accordance with what is just and equitable, would be compelled to hold that the one who first located the land, and claimed the water, was entitled to sufficient to irrigate his land; for equity declares that he who is first in time is first in right.

In this case the respondent was first in time, and, giving the construction to the statute indicated above, under it he would undoubtedly be entitled to the water in dispute.

For these reasons the judgment of the court below is affirmed with costs.

Exceptions overruled.

UNION MILL AND MINING COMPANY V. FERRIS ET AL.

(2 Sawyer, 176. U. S. Circuit Court, District of Nevada, 1872.)

¹ **Government title to streams in public land.** Before title to public lands is acquired from the government of the United States, no occupancy or appropriation of the water flowing through the same, nor State legislation, nor decision of State courts, can in any manner qualify, limit, restrict or affect the operation of the government patent.

¹ *Basey v. Gallagher*, 1 M. R. 683.

¹**The government has an unqualified right** to dispose of the public land; a stream of running water is part and parcel of the land through which it flows, and the use of it as an incident to the soil passes to the patentee, who can only be deprived of it by grant, or by the existence of circumstances from which it is the policy of the law to presume a grant.

The Statute of Limitations does not run against the United States.

Presumptive grant of water-rights. If the owner of a tract of land for which he holds patent from the government, through which land a stream of water flows, has, by reason of the adverse possession and use of the stream by an upper proprietor, presumptively granted to the latter the use of the stream for purposes of irrigation, such grant does not affect lands on the same stream acquired by the lower proprietor after such presumptive grant had its origin.

The Ditch Act construed with reference to prior patents. The act of Congress of July 26, 1866 (R. S. § 2339), is not retrospective in its operation, and does not in any manner qualify or limit rights acquired under a patent issued before the act became a law; but rights acquired by priority of possession were by that act confirmed, and are entitled to protection as against one claiming as riparian proprietor merely, through a patent subsequently issued, and when no right had vested in the patentee before the passage of the act.

²**Use of water, when adverse.** The use of water by a riparian proprietor is not adverse unless it appears that its use causes such injury to another as would justify an action for its redress.

Use of water by riparian proprietor. A riparian proprietor may make a reasonable use of the water of a stream for purposes of irrigation, but before he can acquire a right to the water by adverse use or prescription, the burden is on him to show that his use has amounted to an actionable invasion of the right of another.

Reasonable use—How determined. Each riparian proprietor may make a reasonable use of the stream, and what this is depends upon the circumstances of each case. It would not be permissible to take the water at some distance above, and return the surplus at some distance below the land of the proprietor using it, if thereby a considerable portion of the water is wasted to the injury of the proprietors below.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

Bill in equity to restrain the diversion of water.

The facts sufficiently appear in the opinion of the court.

SUNDERLAND & WOOD, WILLIAMS & BIXLER, and A. C. ELLIS, for plaintiff.

R. S. MESICK and CLARKE & LYONS, for defendant.

¹ Compare *Farley v. Spring Valley Co.*, 58 Cal. 142, and *Lux v. Haggin*, 4 West C. R. 256.

² *Union Co. v. Dangberg*, 8 M. R. 113.

By the Court, HILLYER, J.

This suit was commenced on the fourth day of August, 1871, to enjoin the defendant from an alleged wrongful diversion of water from Carson river. Albert Ferris, having since the commencement of the suit acquired the interest of Peter Lightle, one of the original defendants, has been substituted as a defendant. Lightle answered separately, and the present decision involves only the questions at issue between the complainant and the defendant Albert Ferris. This is one among several causes instituted by the complainant against numerous residents along the Carson river, in Carson valley, and has been submitted as, in several respects, a test case. It appears that in the spring of 1861, B. F. Wheeler and others located, as a possessory claim, the land upon which the Merrimac mill is situated. In May of that year the construction of a mill was commenced, and it was completed in September following. A dam and mill-race, for conducting the water to the mill, were made at the same time. The possessory claim to this land, with the mill and water privilege, have been conveyed to the complainant. Since its completion, the mill has been propelled by the water of the Carson river; and, saving temporary stops, has been constantly run for the purpose of reducing metalliferous ores. The complainant is now owner in fee of the land upon which the mill, dam and mill-race are situated, the foundation of its title being patents emanating from the United States. Two of these, for forty acres each, are dated September 15, 1864; and the third, for one hundred and sixty acres, is dated October 10, 1866. The waters of Carson river naturally flow through each of these parcels of land.

In the year 1858, one T. F. Bowmer entered upon a portion of the public land situated about twenty miles above the point where the complainant's mill stands. This possessory claim was, after several mesne conveyances, finally conveyed to Peter Lightle, the grantor of Ferris. Lightle continued in the actual possession of the land, and on the 15th June, 1865, obtained a patent from the United States for 158 33-100 acres, and on June 26, 1869, a patent from the State of Nevada for 80 acres. This is arable farming land, and the east fork of Carson river flows naturally through both parcels.

In 1860, Lightle and Bowmer, being then joint possessors of this land, diverted a portion of the water of the east fork of the river, and conducted it by means of a ditch onto this land, where it was used for irrigation. Water has been used, to some extent, continuously on this land since that year in the irrigating season. Prior to the issue of the patents therefor, the land of both parties was public, and the property of the United States. The defendant admits a diversion of water, and claims a right to do so on the grounds, firstly, of prior appropriation and use; secondly, of prescription; and thirdly of riparian proprietorship.

It is also claimed that the act of Congress of July 26, 1866, confirms the right of defendant, acquired by priority of appropriation.

We consider it to be entirely clear that before the title to these lands was acquired from the government of the United States, no occupancy or appropriation of the water by either party, no State or Territorial legislation or rule of decision established by the State courts in controversies between occupants of the public land, without title from the government, can in any manner qualify, limit, restrict or affect the operation of the government patent; that the government has a perfect title to the public land and an absolute and unqualified right of disposal; that a stream of running water is part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passes to the patentee, who can be deprived of it only by grant, or by the existence of circumstances from which it is the policy of the law to presume a grant; that the government, as proprietor of the land through which a stream of water naturally flows, has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise, and that a statute of limitations does not run against the United States. Upon the foregoing propositions it is not deemed necessary to enlarge. They seem incontestable, and we shall content ourselves with a reference to the case of *Vansickle v. Haines*, 7 Nev. R. 249, wherein the authorities are collected, and the law stated in the clearest and most satisfactory manner, and the case of *Gibson v. Chouteau*, 13 Wall. 93. In *Vansickle v. Haines*, the court held: That the United States is the absolute and unqualified proprietor of all

the public land to which the Indian title has been extinguished; that running water is primarily an incident to the ownership of the soil over which it naturally flows; that the government patent conveys to its grantee not only the land through which a stream naturally flows, but also the stream; that neither Territorial nor State legislation can in any wise impair or modify the right of the government to the primary disposal of the soil; that statutes of limitation do not run against the State, so that no use of water while the title to the land is in the government, can avail the defendant as a foundation of title by prescription, or defeat or modify the title conveyed to the grantee by his patent. After examination we are constrained to say, in the language of Mr. Justice GARBER, in that case, that not only the weight of authority, but all the authorities support these propositions.

We propose now to consider how the question of prescription would stand if the act of Congress of July 26, 1866, had not been passed; secondly, the effect of that act; and thirdly, whether there has in fact been any such adverse enjoyment as warrants the presumption of a grant.

And firstly, on September 15, 1864, one David Gammel obtained a patent for what is now the upper portion of complainant's land, consisting of two forty acre tracts. On October 10, 1866, Oliver Racicot obtained a patent for the lower portion, embracing one hundred acres. The complainant's mill is on the lower premises, the dam and race on the upper. As none of the time during which the defendant used the water prior to the issue of the patents can be counted as part of his adverse possession, his prescriptive title could have had no legal commencement as against Gammel's title, before September 15, 1864, nor as against the title of Racicot, before October 10, 1866. From September 15, 1864, to the commencement of this suit, is more than five years; and from October 10, 1866, to its commencement, is less. Thus any prescriptive title to the water must have its origin after September 15, 1864, and before October 10, 1866. Admitting, for this argument, that the defendant had acquired by adverse use a right to divert the water as against the Gammel title, can that affect the title acquired from Racicot, the complainant being now the owner of both titles? A very little examination will show that it can not. What the defendant in

effect claims, is, that after Gammel acquired the government title to the upper premises, and before the title to the lower had passed from the government, Gammel made a grant to the defendant of a right to use a portion of the waters of the stream flowing through his land, which, without such grant, he could have insisted should descend to him. At the time this grant must have its origin, the government had not conveyed, but was still the owner of the lower premises. It certainly needs no argument beyond this statement to show that Gammel could convey to the defendant no interest of any description in the land below, which was then the property of the United States. We may, under certain circumstances, presume a grant, but we can not presume that such grant conveyed or attempted to convey something to which the presumed grantor had no title. It follows that Racicot took from the government in October, 1866, a perfect title to his land, unaffected by any grants made by proprietors above him. This is the title by which the complainant holds the lower premises.

But it is said that the right of defendant by prescription as against the complainant, was, in law, a grant by complainant to defendant, at least as against premises conveyed by the patents of 1864, and that the complainant can not now defeat that grant by the purchase of premises lower down on the stream. This position seems untenable. We have already seen that the titles to the upper and lower premises were distinct at the time the grant must have originated, the upper being owned by Gammel, the lower by the United States. It has also been shown that the easement claimed can be attached only to the upper premises, because there could be no presumption of grant or adverse use as against the lower premises, while the property of the United States. If we admit that the complainant's grantor, Gammel, granted, in fact, the water right claimed to the defendant, it was a grant of a parcel of the estate he then had in the upper premises, and the complainant took the upper premises subject to that grant; but it is impossible to see how the purchase by the complainant afterward of another parcel of land, no part of which had been conveyed to defendant, can be said to be an act destructive of the force of the grant made by the owner of the upper premises. The union of the two titles long after

the grant was made, can not operate to enlarge the grant. The defendant has the easement which was granted to him in the upper premises, but as he never had any in the lower, it can make no difference to him whether the latter are owned by the complainant or some other person. In *Bliss v. Kennedy*, 43 Ill. 68, the complainant purchased from the defendant, Kennedy, a lot of land upon which there was a factory and a water privilege. Afterward the defendant purchased a tract of land above, built a factory and used the water of the stream therein. The claim of the complainant was, that Kennedy, by his deed to Bliss of the lot and factory below with the "appurtenances," virtually covenanted that his grantee should have the use of the water as it then came to the factory—the flow of the water being appurtenant to the land granted. Kennedy, at the time of making this deed, had no right, title or claim to any land, save that on which the factory was erected. "By his deed," says the court, "he can not be held to have sold and conveyed anything but the land and factory specified in it, and the appurtenances to that land and factory then belonging. * * * All that belonged to the tract conveyed, and over which Kennedy then had dominion, passed by his deed under the term appurtenances. Kennedy, when he conveyed the factory and land with its appurtenances to complainant, owning nothing outside the boundaries of the land conveyed, above or below the factory, could convey nothing; and, therefore, no part of the stream above the factory could pass as appurtenant to it." So, in this case, the owner of the upper premises at the time the presumed grant must have had its origin, having no interest in the premises below could convey none to his grantee. The complainant, then, by virtue of his ownership of the lower premises, has a right to have the water of the river flow to these premises, unaffected by any right arising out of an adverse use as against the upper premises, unless there is something in the act of Congress qualifying that right in respect to the lower premises.

On July 26, 1866, Congress passed an act, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," and it is therein, among other things, enacted, "that whenever, by priority

of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 14 Stat. U. S. 253. Prior to the passage of this act, the policy of Congress had been, as shown by its legislation, to grant to purchasers of the public land the bed of a non-navigable stream flowing through the land sold, and the lines of sections were run without reference to the meanderings of such stream; so that the purchaser of land through which a non-navigable stream flowed, took the bed of the stream and such riparian rights to the water of the stream as belong to the owner of the soil. Several attempts had been made to provide by law for the survey and sale of the mineral lands; the survey to be rectangular, as in case of other lands. These attempts had always been successfully resisted by the mining communities, because, among other reasons, such a survey and sale would have been ruinous to the possessors of quartz lodes, which do not descend perpendicularly, but at a greater or less angle. For seventeen years prior to 1866, the mineral land of California and Nevada had been occupied by the citizens of the United States, without objection on the part of the government. Canals and ditches were dug during this time, often at great expense, over the public lands, and the water of the streams diverted by these means for mining and other purposes. Local customs grew up in the mining districts, by common consent, and by rules adopted at miners' meetings for governing the location, recording and working of mining claims in the particular mining district. Possessory rights to public lands, mining claims and water, were regulated by State statutes, and enforced in the State courts. The rules, customs and regulations of the miners were also recognized by the courts, and enforced in trials of mining rights. The courts not applying, in all respects, the doctrine of the common law respecting riparian owners, in deciding between these possessors, none of whom had title to the soil, recognized a species of property in running water, and held that he who first appropriated the waters of a stream to a beneficial pur-

pose, had, to the extent of his appropriation, the better right as against persons subsequently locating on the stream, above or below; and that the first appropriator might conduct the water in canals, ditches and flumes wheresoever he pleased, and apply it to whatsoever beneficial purpose he saw fit, without any obligation to return it to the stream whence it was taken, or preserve its purity or quantity: *Kidd v. Laird*, 15 Cal. 162; *Weaver v. Eureka Lake Co.*, Id. 271; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir S. M. Company v. C. Carpenter et al.*, 4 Nev. 534. In this posture of affairs, the persons who had constructed these canals and ditches, at an expense of hundreds of thousands of dollars, in many instances, over the public land, saw, when the question of the sale of those lands was agitated, that should such sale be made, they, as to these possessory rights, would be at the mercy of the buyer of the legal title, without some protective legislation. The act of 1866, section 9 of which we have quoted in part, was a consequence of this state of things. It gives the possessor of quartz lode a right of pre-emption, and it declares that the person who has acquired a right to the use of water by priority of possession shall be maintained and protected in the same, if such right is recognized and acknowledged by the local customs, laws and decisions of courts. The policy of this enactment, so far at least as it relates to agricultural districts, may be doubtful, but it is the law of the land, and the courts must carry out what appears to be the intention of the legislature, as therein expressed. And that, as indicated by the act, appears to be to grant to the owner of possessory rights to the use of water under the local customs, laws and decisions, the absolute right to such use, which the government alone could grant. Under this law, when a possessory right to the use of waters is claimed, whether or not such right exists will be determined by reference to the local customs, laws and decisions; and the question will be determined just as it would have been had it been raised between occupants before the title to the land had passed from the government. When the right is thus ascertained, the statute has the force of confirming it to the person entitled under the local laws and decisions. But the act is prospective in its operation, and can not be construed so as to divest a

part of an estate granted before its passage. If it be admitted that Congress has the power to divest a vested right by giving a statute a retrospective operation, that interpretation will never be adopted without absolute necessity: *Blanchard v. Sprague*, 3 Sum. 535; *Vansickle v. Huines*, 7 Nev. 249. As this law, being general in its terms, can not be held to operate retrospectively, it follows that the defendant's patent of June 15, 1865, and the complainant's of September 15, 1864, are in no manner qualified by this act, passed subsequent to their issue. As against these patents, neither can claim any right to the use of the water by virtue of prior appropriation or possession, but, in respect to them, their rights to the water must be fixed by the law applicable to them as owners of the soil through which the stream naturally flows.

But if, when the act was passed, the defendant had such a right by priority of possession as that act contemplates, upon the construction which must be given, that right is confirmed in him, and he is entitled to protection as against one claiming as riparian proprietor merely, through a patent issued after, and when no right had vested in the patentee before the act became a law. The statute is, in effect, incorporated into such subsequent patent, and operates as an exception out of the estate granted to the complainant by the patent of October 10, 1866. If we have rightly interpreted the act of Congress, and the operation of the patents issued before and after the passage of that act is as we have stated, the case stands in this wise: The defendant's claim by virtue of adverse enjoyment, falls to the ground, because sufficient time has not elapsed since the lower premises were conveyed by the government. He can not sustain his claim by force of the act of Congress, because the complainant's patents of September, 1864, were made before the act was passed, and conveyed the upper premises absolutely, and free from any claims by prior possession merely. We have hitherto been considering the questions of prescription and the act of Congress separately, as it was desirable to determine the effect of the act and of the patents upon these water rights. But the complainant having taken the lower premises, subject to such right as the defendant had acquired by priority of possession and the act of Congress of 1866, if he had also acquired by adverse use, a

right, as against the proprietors of the upper premises, to divert and use the same quantity of water in the same manner that he would have by virtue of his prior appropriation, this would be a complete defense to this action, for the complainant's right would not be infringed by the diversion, either as proprietor of the upper or lower premises. It is therefore necessary to ascertain whether there has been in fact such adverse use by defendant as affords a presumption of a grant from the proprietor of the upper premises of the complainant.

The answer of this defendant sets out his prescriptive right as follows: "That for more than five years prior to the commencement of this suit, he has, during the irrigating season of each year, under claim of right, openly, continuously and peaceably, and adversely to the complainant and all persons whatsoever, used the waters of said Carson river in irrigating said land, and the crops of grass, grain and vegetables grown thereon, and for stock and domestic purposes; whereby defendant has acquired the absolute and exclusive right to use a part of the water of said Carson river in manner and for the purposes aforesaid."

The claim is of a right to use a part of the water of the river during the irrigating season, for irrigation, stock and domestic purposes. The bill charges the unlawful diversion to have commenced on the first day of July, 1871, and continued until the commencement of this suit, August 4, 1871. The testimony shows that the irrigating season upon the defendant's land, for grain, ends on or before the first of July, and for grass, from the first to the middle of July. Prior to the issue of complainant's patent of September 15, 1864, we have seen the five years could not commence to run in defendant's favor. The patent having been issued after the irrigating season of 1864 was over, the earliest moment the time could begin is the irrigating season of 1865. But the defendant's use is not adverse until it becomes injurious to the complainant, and amounts to an actionable invasion of its right: *Haloman v. Boiling Spring Co.*, 14 N. J. Eq. 335; *Angell on W. C.* 386; *Washburn on Easements*, 125. It is not sufficient to show a use of the water in a particular way, but it must also appear that such use caused such injury to

the complainant as would justify an action for its redress. A thorough reading of the testimony fails to show any such use of the water in the irrigating seasons of 1865 or 1866 (and we need go no further) as amounts to a violation of the complainant's right, or as would have justified an action against the defendant. Lightle testifies that "water was used on the land continuously since 1860 until 1870. The water was used on the land during the irrigating season, and at other times it ran through the ditch." The capacity of the Lightle ditch is the same now as in 1861, but what the capacity was is not shown. Lightle further says that during the years 1861-2-3-4 "a great deal more" water was used on the Lightle land than in subsequent years. How much less in later years does not appear. Nor does it appear what quantity of water was diverted in 1865 and 1866, nor how much was absorbed or lost, nor what surplus found its way back into the river. Nor is it shown that the complainant was injured at its mill in the month of July of those years by lack of water to run its machinery. The witness McGill states that in 1865 there was not sufficient water to run all the machinery in the mill in August, September and October; that in 1866 the supply was about the same as in 1865, and that in 1867 he don't think the machinery of the mill was much retarded. If any inference could arise, from this lack of water, that the defendant's use was the cause, or partially so, it does not aid the defendant; because the scarcity in those years occurred after the close of the irrigating season, and, consequently, at a time when the defendant does not claim a right to divert the water and use it for irrigation. It is not shown by the testimony that in these years of 1865 and 1866 the use of the water by defendant during the irrigating season of those years caused any injury to the complainant. It devolves on the defendant to show when his adverse use began, or that it began at least five years before the bringing of this suit. This he has not done. So far as appears, his use of the water during the irrigating seasons of 1865 and 1866 may have been a reasonable and proper exercise of his riparian rights, and entirely consistent with the complainant's full enjoyment of its right to use the water. For without deciding here to what extent water may be used for irrigation, it will not be denied that a riparian proprietor

may lawfully make some use of it for that purpose, so that the simple fact that the water was used for irrigation, does not show that the complainant's right was violated. The defendant does not even show that his use of the water, in the years mentioned, sensibly diminished the water in the river, and if it did not, the complainant was not injured actionably, under the narrowest rule laid down in any case. The adverse use must be under claim of right. Defendant, in his answer, alleges his use to have been under claim of right during the irrigating season, and he must be confined to that period. The burden of proof is on him, and he must establish his adverse enjoyment in the most satisfactory manner, before the court can indulge in any presumption that the complainant granted to him any material portion of the motive power of its mill. For this failure to show, by clear and unequivocal proof, that subsequent to the complainant's patent of September 15, 1864, and five years anterior to the commencement of this suit, the use of the water amounted to an actionable invasion of the complainant's right, the defendant's claim of title by prescription must be denied.

It remains to determine whether the defendant, as alleged in the bill, wrongfully diverted water from the river between the first day of July and the fourth day of August, 1871.

A large part of the testimony submitted was taken in other causes, and, by agreement of counsel, used in this; and so much of it has no bearing on this case that it has been found somewhat difficult to arrive at the facts. The following, however, may be stated as bearing on the question now to be decided:

The climate of Nevada in the summer is arid. The year 1871 was an unusually dry one, and less water ran in Carson river than ever before known; and in the latter part of July, and in August and September of that year, there was less water by one half than in ordinary seasons. In the months of July and August, 1871, the complainant's mill could not be operated for want of sufficient water, and had to suspend. One Danberg farmed the Lightle (defendant's) land in 1870 and 1871, Lightle himself having left his farm in 1870. Lightle's land is agricultural, and requires irrigation to make it productive. The Lightle ditch is taken out of the east fork

of Carson river, at a point in section 5, township 12, a considerable distance from the Lightle land, which is situated on other sections, and through it water is conducted onto that land. The capacity and grade of the ditch are not stated, but Lightle's answer admits a diversion since the first day of July, 1871, of "about two thousand inches as it flows)," part of which was used by Danberg on his own land. Danberg says he ran the ditch as full as he could get it in 1871, and at times, used one half of the water on Lightle's and one half on his own land; at other times, when not needed on Lightle's land, the whole was carried onto his. The Lightle land embraces two hundred and thirty-eight acres, but how much of it was under cultivation in 1871 does not appear. It lies, in the main, between the east and west forks of Carson river, which unite above the complainant's premises. It appears that a part of the water used on the Lightle land does "find its way" into the west fork and some into the east; but in both cases after it has left the defendant's land. As to the quantity or proportion of the water returned to either fork there is nothing definite. Witness, Read, who was there in July and August, 1871, says very little, if any, found its way back to the river. The east fork is on higher ground than the west, and water runs off from it to the west naturally. It does not appear what quantity of water was flowing in the east fork at Lightle's in July, 1871. Many other persons were diverting water from both the east and west forks in July and August of that year. As before said, the "irrigating season" as respects the Lightle land ends, for grain, July 1, or before that; for grass, from the first to the middle of July. Some seasons, Lightle says, he does not need water at all for irrigating grain. It is not shown how many acres of Lightle's land were cultivated for grass or for grain. Danberg says he farmed the Lightle land, and that is all there is on this point. It does not appear that in 1871 any of the water was used on Lightle's land for household purposes, or for watering stock, and as Lightle was not living on the land this year, probably the water was used for the sole purpose of irrigation.

There can be no doubt, in this case, that the diversion of the water onto Lightle's land, and allowing it to be absorbed there after July 15th, when the irrigating season was over, was

an unreasonable use of the water, and the complainant is entitled to relief so far. The defendant does not claim a right to so use the water, except during the irrigating season. As to the period from the first to the fifteenth of July, a part of the irrigating season, it is necessary to determine whether the defendant has the right to use the water for irrigation to any extent, and if he has, to what extent. The complainant denies his right to use the water for irrigation to its injury in any degree. The defendant, on the other hand, claims that in a hot and arid climate like ours, water may not only be used for that purpose, but it is a natural want, like the thirst of men and cattle, to satisfy which the riparian proprietor, who has the first opportunity, may consume, if necessary, the whole stream; and that such use under the conditions existing here is reasonable.

The law on this subject is stated by Chancellor Kent in the third volume of his commentaries, and has very frequently been quoted, both by the courts of England and America, with unqualified approbation. It is this: "Every proprietor of lands on the bank of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct as it passes along. Though he may use the water while it runs over his land, he can not unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty that arises consists in the application. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind, to debar every riparian

proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations mentioned; and there will, no doubt, inevitably, in the exercise of a perfect right to the use of the water, be some evaporation and decrease of it, and some variations in the weight and velocity of the currents. But *de minimis non curat lex*, and a right of action by the proprietors below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. 'All that the law requires of a party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream.' In England it seems that a proprietor is not permitted to use water for irrigation, if thereby he sensibly diminishes the stream: *Wood v. Waud*, 3 Exch. 746; *Embrey v. Owen*, 6 Exch. 353. In this latter case it was said: "Nor do we mean to lay down the rule that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend on the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or cattle to drink it. It is entirely a question of degree; and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application." And it was there held, that, as the "diminution of the water was not per-

ceptible to the eye," the use of it by the defendant for irrigation was not unreasonable, or prohibited by law. Actual, perceptible damage, it seems, would give a right of action. In our own country, while any general or unlimited right to use water for irrigation has been denied, it has sometimes been said, that owing to differences in the climate and the size of the streams, a more liberal use is allowed than in England. In Maine, it is held that a proprietor may make a reasonable use of the water for domestic purposes for watering cattle, and even for irrigation, provided it is not unreasonably detained, or essentially diminished: *Blanchard v. Baker*, 8 Greenl. 253. In Connecticut, the doctrine is thus stated: "The right of the defendant to use the stream for purposes of irrigation can not be questioned. But it was a limited right, and one which could only be exercised with a reasonable regard to the right of the plaintiff to the use of the water. She was bound to apply it in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle." *Gilbert v. Johnson*, 30 Conn. 180. The stream in question rose on the defendant's land, and naturally flowed to the plaintiff's, who had a place on his land for watering his cattle, and the whole stream could be run in a half-inch pipe. The Supreme Court of Massachusetts say: "That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established, as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor can not, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191. In New York, "the defendant has a right to use so much water as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel." *Arnold v. Foot*, 12 Wend. 330. It would be useless to cite or quote more from the numerous cases on this subject. The re-

sult of the authorities appears to be well expressed by Mr. Washburn in the late edition of his work on "Servitudes and Easements," in the following language:

"The right of a riparian proprietor, *jure naturæ*, to divert water from a stream, when reduced to a simple proposition, seems to be this: He may not do it for any purpose except domestic uses, and that of irrigating his land; and whether and to what extent he may do the latter, depends, in each particular case, upon whether it is reasonable, having regard to the condition and circumstances of other proprietors upon the stream; and this is to be determined in all cases of doubt by a jury. But in no case may he do this so as to destroy, or render useless, or materially diminish, or affect the application of, the water by other proprietors." Washb. on Eas. and Serv., 2d Ed. p. 240, 12. The fundamental principle upon which the authorities all go is this: That every proprietor of land, through or by which a stream of water flows, may make a reasonable use of it for any useful purpose. What is a reasonable use depends on the circumstances of each case, and can not be stated in a general rule. Every proprietor along the stream has an equal right to its use and benefit. All have a usufruct; none have any absolute property in the water, and no one has a right to use it unreasonably to the injury of his neighbor, above or below. It is sometimes stated that the proprietor above may exhaust the stream for household purposes, and for watering his cattle; and that to this extent, having the first opportunity, he has a preferred right. If this be so, it is still upon the ground that the use is reasonable under the circumstances. No case is recollected where this precise question was necessarily involved; and it may admit of question whether an upper proprietor on a small stream would be permitted to consume the whole of it in watering his cattle, and deprive his neighbor below of sufficient water to quench the thirst of himself and family. In some cases, the wants of riparian proprietors have been divided into natural and artificial; natural wants being *primary* wants, and such as are absolutely necessary to be supplied, such as thirst of people and cattle; and artificial wants being *secondary*, and such as are simply for the comfort, convenience or prosperity of the proprietor; and these latter are held to be subservient

to the former: Angell on Watercourses, 210, 1. In *Evans v. Merriweather*, 3 Scam. 496, the Supreme Court of Illinois make this division of wants, and say that while water for irrigation is an artificial want in Illinois, in a hot and arid climate it would be a natural want. There was no question in that case in regard to irrigation, and the remark is simply dictum. The Supreme Court of Texas, in *Rhodes v. Whitehead*, 27 Texas, 304, said upon this subject: "It may be admitted that the purpose of irrigation is one of the natural uses, such as thirst of people and cattle, and household purposes, which must absolutely be supplied; the appropriation of the water for this purpose would therefore afford no ground of complaint by the lower proprietor if it were entirely consumed," and they cite *Evans v. Merriweather*. The question evidently received no consideration, but the court made the admission, as courts often do, because, admitting such a right to use the water for irrigation, the defendant in that case had exercised his right in an unlawful manner, and the case went off on that point.

These two cases are the only ones referred to as sustaining the defendant's claim that water for irrigation is, in this climate, a natural want, and we are asked to class it with the want of water to quench thirst of men and cattle. To put the use of water for irrigation upon the same footing as the use of it to satisfy thirst, is to say that an upper proprietor may take the whole stream, if needful to the growth of vegetation upon his land, and leave those below him without water to drink. This certainly can not be law in any climate. But "water for irrigation" is not a natural want in the same sense that water to quench thirst is. If it were it could not be made to depend upon the climate. Water is a natural want of man and beast in every country and climate. So water is a natural want of vegetation everywhere, without reference to the climate, for the laws of vegetable growth are the same in Illinois and in Nevada. Irrigation is a mode of applying water to satisfy this want. Hence it does not seem to be entirely accurate to say that "water for irrigation" is a natural want in Nevada and not so in Illinois. What is true, undoubtedly, is, that there exists in this climate a greater necessity for the application of water to the purpose of irrigation than in countries where the rain falls during the summer months, and this may

be a proper fact to consider in determining the question of reasonable use. To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction of the rights of other proprietors on the stream, who have an equal need and an equal right. The more we examine the more we become impressed with the wisdom of the common law rule, that each proprietor may make a reasonable use of the stream, and that what that is depends upon the circumstances of each case. It will also be seen from the rule, as before stated, that the question of reasonable use is not to be determined solely by the wants of the party using the water—whether the amount is reasonably sufficient for his own lawful purposes—but reference must also be had to the rights and needs of other proprietors upon the stream. “The necessities of one man’s business can not be made the standard of another man’s rights in a thing which belongs equally to both.” *Wheatley v. Chrisman*, 24 Penn. St. 302; *Brace v. Yule*, 10 Allen, 417; *Hayes v. Waldron*, 44 N. H. 583–4. No more definite rule can be safely laid down which will be of universal application. Under this rule the character of the soil and climate, instead of fixing the right absolutely, become circumstances only to be weighed in determining the question of reasonable use. The climate of Nevada is arid in the summer season, and the soil then needs irrigating to make it productive, but not always to the same extent. In the valley of the Carson river, some of the land needs little or no irrigation, other portions require a great deal. The defendant’s land requires less water than that of his neighbor Danberg. Indeed, some seasons he says it needs no water for irrigating in order to raise grain. This must be considered in ascertaining the extent to which Lightle may reasonably use the water. There will also enter into the inquiry the nature and size of the stream; the uses to which it can be or is applied; the nature and importance of the use claimed and exercised by one party, as well as the inconvenience or injury to the other party; the proportion of water diverted, compared with the whole volume of the stream; the quantity lost and absorbed; the manner of taking and conducting the water onto the land; the mode in which it is used

there; the quantity of land under cultivation; the kind of crop; the means adopted for returning the water to its natural course; and all other matters bearing upon the question of fitness and propriety in the use of the water: *Hayes v. Waldron*, 44 N. H. 580; *Thurber v. Martin*, 2 Gray, 394. And it may occur that a use reasonable one season will become unreasonable at another. When the Carson river is full it is a large stream, and probably every proprietor might then use so much water as he saw fit, for irrigation or any other useful purpose, without affording any ground of complaint to those below him, while at low stages of water such an extensive use might cause great injury, and could not be permitted. When there is an insufficient quantity to satisfy all the wants of all, if it is possible to do so, is it not more reasonable to apportion the water as fairly as may be among the proprietors, than to permit one who happens to be above to satisfy all his wants without regard to those of his neighbor below? In regard to the comparative benefits derived by our community from mining and agriculture, or the injury which it will sustain by fostering one at the expense of the other, they may be questions involved in the consideration of what constitutes a reasonable use. Irrigation must be held, in this climate, to be a proper mode of using water by a riparian proprietor, the lawful extent of the use depending upon the circumstances of each case. With reference to these circumstances the use must be reasonable, and the right must be exercised so as to do the least possible injury to others. There must be no unreasonable detention or consumption of the water. That there may be some detention and some diminution follows necessarily from any use whatever. How long it may be detained or how much it may be diminished can never be stated as an arbitrary or abstract rule. It is now only necessary to apply these principles to the circumstances of the case in hand. After the middle of July, as we have said, the diversion was unjustifiable because the irrigating season had then closed. As to the period from the first to the middle of July, there was manifestly an unreasonable use and waste of water, but the testimony is not so clear and full upon some points as we could wish. We are not informed with any degree of precision what quantity of water

was then flowing in the river; what crop was irrigated, although it may be presumed that it was hay or grain, or both; what quantity was diverted beyond the very indefinite admission in the answer of "about 2,000 inches as it flows"; what quantity of water would irrigate the defendant's land, nor how many acres were under cultivation, nor how much water was returned to the river. We do know that the ditch was kept full of water; that a portion of the time one half of the water was used on the Lightle land, and one half on Danberg's, and that at other times, when not wanted on the Lightle farm, it was all used on Danberg's.

It may also result from the principles established by the authorities, that the riparian owner is only entitled to take the water from the stream on his own land, returning it to the stream before it leaves his land. This point does not appear to have been expressly decided, but whenever the authorities allude to it at all, they speak of taking the water on the land of the riparian proprietor, and returning the surplus before it leaves the land, as though this was a well-recognized condition of a proper use. However this may be, it would not be permissible to take the water at some distance above, and return the surplus at some distance below, the land of the riparian proprietor using the water, if, thereby, a considerable portion of it would be wasted before reaching the land, or after leaving it, and before it is returned to the stream, to the injury of other riparian proprietors below. At all events, this circumstance would have an important bearing upon the question of reasonable use.

The defendant diverts the water at a point considerably distant from his land, and his ditch does not return any of the water to the river, but either conducts it onto Danberg's farm, or leaves it, principally, to find its way through sloughs or down the natural declivity to the west fork, more than a mile distant, some little, perhaps, to the east fork, whence it is taken. This statement, we think, shows that the use made of the water by the defendant at the period in question was unreasonable, and amounted almost to wanton waste. Certainly, the defendant can not, by virtue of his ownership of the soil, justify the diversion of twice as much as he needed on his own land, and permit

the other half to run upon the land of another. Nor does it seem that the defendant can justify the diversion of so much as 1,000 inches of water "as it flows" to irrigate his grass land. For although this quantity is quite indefinite, it is evident that 1,000 cubic inches of water constantly flowing is a very considerable quantity, even if we admit the grade of the ditch, which is not given, to be slight.

From the testimony of Klauber as to his own land, it appears that 400 inches of water would irrigate 400 acres of land, if kept constantly flowing. But as the grade of the defendant's ditch is not given, we have no means of knowing how much the 1,000 inches "as it flows" exceeds one inch to the acre of defendant's 238 acres, as measured by Klauber.

Upon the case as now presented no final decree, which will properly adjust the rights of the parties, can be entered. The case must be referred to a master to make inquiry and report, whether the defendant has adopted the mode which causes least waste in taking the water from the river, and if not, what mode consistent with the fair and beneficial use of the water by him can be adopted; what means are employed to return the water to its natural channel, and are they the means best calculated to prevent waste; if not, or if none have been employed, what method will best effect that object; what amount of water per acre is needed during the irrigating season to irrigate defendant's land; some standard of measurement of the water, and the quantity, measured by such standard, flowing in the river and in defendant's ditch at the time mentioned in the bill. Until the court is in possession of these facts it is not possible to determine the extent to which the use by the defendant was unreasonable, and to which he ought to be enjoined. The decree of the court must be drawn up accordingly, and all other matters are reserved until the coming in of the master's report.

¹ UNION MILL AND MINING CO. v. DANGBERG ET AL.

(2 Sawyer, 450. U. S. Circuit Court District of Nevada, 1873.)

² **No presumption of grant from adverse use of water.** In order to raise a presumption of a grant from the adverse use of water, such use must have been peaceable and with the acquiescence of the owner of the servient tenement; if such owner remonstrated against the use of the water by the dominant tenement for the purposes of irrigation, this is sufficient to show that the use was not acquiesced in.

Adverse use without actual damage. There may be an invasion of the right which will justify an action although no actual damage is shown; as, if one should divert a portion of the water permanently from the stream, such a diversion, if continued the requisite length of time would ripen into a title; but if the riparian proprietor only exercises his natural right in the use of the water without damage to the servient tenement, then the use is not adverse.

Riparian rights before patent—Act of July 26, 1866. One who has entered and paid for land and received a certificate of purchase, but no patent, is yet entitled to claim and exercise riparian rights; and so, too, of one who has entered land under the Homestead Act, and one who entered and paid for his land prior to the passage of the act of Congress of July 26, 1866, is not affected by it.

Unreasonable use of water. A use of water which is unreasonable is such as works actual, material and substantial damage to the common right; not to an exclusive right to all the water in its natural state but to the right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor.

Use of water for domestic purposes, etc. Every proprietor may, in the exercise of the common right, consume so much water as is necessary for his household and domestic purposes, and for watering his stock.

³ **Injunction—The threatened continued use of water for irrigating,** to the injury of another, is of that class of "continually recurring grievances" which only equity can redress.

Form of decree between mill-man and irrigator. Where there was a right in one to a first use and a right to the surplus in another, and (owing to its variable flow) the water could not be divided by inches, the decree was drawn restraining diversion of the water to the injury of plaintiff, with a *proviso* allowing use of surplus to the defendant.

⁴ **Apportionment of costs in equity.**

¹ See, generally, the note to *Vansickle v. Haines*, *post* WATER; and Irrigation notes, 8 M. R. 136.

² *Smith v. Logan*, 1 West C. R. 391.

³ *Wilcox v. Hausch*, 1 West Coast R. 481.

⁴ *Irwin v. Davidson*, 7 M. R. 237.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

Injunction Bill. The facts appear in the opinion, and in the case of the same plaintiff against Ferris, reported *ante*. (8 M. R. 90.)

SUNDERLAND & WOOD and WILLIAMS & BIXLER, for plaintiff.

CLARKE & LYON, R. S. MESICK and CLAYTON & DAVIES, for defendants.

By the Court, HILLYER, J.

Eleven suits were commenced by the plaintiff in the year 1871, against various persons, to restrain them from an alleged wrongful diversion of the waters of Carson river. At the March term of 1872, the case of one defendant, Albert Ferris, was argued and submitted. Several points decided in that case arise in them all, and as our opinion remains unchanged in respect to them, they will not be discussed again now. (*Ante*.) After that decision was announced, decrees were entered in six of the eleven cases, upon stipulation of counsel. The remaining five cases have now been submitted, and such points as were not determined in the case of Ferris will be briefly noticed, with the principles which have controlled the court in the rendition of final decrees.

In the first place the defendants, H. F. Dangberg, H. A. Dangberg, A. Klauber, F. A. Frevert, Jones, Squires and Winkleman, claim that they have a good defense through an adverse use and enjoyment of the waters for the required length of time.

The qualities which an adverse use must have to support a claim of title thereby, are well settled. The user must be neither secret nor forcible, nor by request, but open, peaceable, and as of right.

The user, to be peaceable, must be with the acquiescence of the owner of the servient tenement. A user which such owner opposes by word or deed becomes forcible, and thus lacks an essential element, without which the use gives no title, and

raises no presumption of a grant. If, says Mr. Washburn, it should appear that during the period of the alleged acquisition of an easement by use and enjoyment, the owner of the servient tenement resisted such claim or opposed such use, it would negative the claim: Wash. on Easements, 154. In *Powell v. Bayg*, 8 Gray, 441, it was said that the title to an easement rests chiefly on an acquiescence in an adverse use, and evidence which disproves the acquiescence rebuts the title to the easement. By the civil law, any enjoyment or user was deemed forcible to which opposition was offered, either by word or deed, by the owner of the servient tenement, and a thing was never presumed to be burdened with a servitude where a doubt existed: Angell on Watercourses, Sec. 210; Kauf. Mack, 323. When the owner of the servient tenement frequently remonstrated against the diversion of the water, it was held that there could be no presumption of a grant: *Stillman v. White Rock Co.*, 3 W. & M. 538.

The evidence in these cases proves that the plaintiff did not, during the five years of alleged adverse use, acquiesce in any use of the water by the defendants beyond that which they might lawfully make of it as riparian proprietors.

It appears that during that period the plaintiff and its predecessors, owners of the Merrimac mill, have asserted their right to all the water which their mill-race would carry, that they have denied the right of the defendants to obstruct or divert the water to their injury, and have repeatedly remonstrated with them against their excessive use of the water in irrigation.

During the irrigating seasons of the years 1865, '66, '67, '68, and '69, the owners of the Merrimac mill, together with other mill-owners on the river, caused a notice to be printed and distributed and posted through the Carson valley, in the vicinity of these defendants, notifying ranchmen and others "that any diversion of, or obstruction to the flow of the water of the Carson river, to the injury of any of the mills thereon will be resisted by all means which the law affords. The rights of said mills to the full flow of the water of said river, as already established by the courts, will be insisted upon and enforced." Men were employed to go through the valley, visit each farmer, distribute these notices, and remonstrate with the

farmers against their excessive consumption of the water for the purpose of irrigation. Here we have a denial of the right to use whenever the use was injurious to the plaintiff, and it is impossible to hold that the user was uninterrupted and peaceful, or to presume a grant.

The Statute of Limitations of this State bars an action to recover real property unless the plaintiff was seized or possessed of the property within five years before its commencement. In analogy to this statute, the length of time necessary to confer title to an easement by adverse use, is fixed at five years by the courts. This is the only operation the statute has in these cases. To ascertain the requisites of an adverse use we still look to the common law, except as to the length of time it must continue, and that we fix in analogy to the local statute. If there has been an adverse use, in the legal sense, for five years, that gives title, and no grant need be produced to establish it; a grant will be presumed. Presuming a grant is in most cases a fiction of law; the court rarely believes the grant ever had an existence. The presumption, then, is not made because the evidence justifies the court in believing that a grant was once in fact made, but because it shows an adverse enjoyment for the required length of time, and possessing all the other requisite qualities. Therefore evidence which shows that the use of the defendants lacks the essential and indispensable requisite of acquiescence on the part of the plaintiff, prevents the presumption from arising.

That there may be, as argued by defendants, an invasion of the plaintiff's right which will justify an action without showing actual damage, is not questioned. But in applying this doctrine a distinction must be taken between those uses of the water which are the exercise of the riparian proprietor's natural right and those which are not. Such proprietor has a right to use the water for the purpose of irrigation as incident to his ownership of the land; the right is not acquired by use. The only limitation is, that he must so use the water as to cause no actual material damage to another; and, of course, no cause of action against him arises until such damage has resulted. On the other hand, one proprietor has no right to divert, in the technical sense, any portion of the water permanently from another, so that it either does not return to

the stream at all, or not until it has passed the land of him below. Such diversion would be a clear violation of right, and if continued adversely for the requisite period, would ripen into title. An action, therefore, would lie for an injury to the right without proving actual damage, or showing that the plaintiff was making any practical use of the water. This distinction is important, and will reconcile much that seems conflicting in the books. If the plaintiff had no mill, and was making no practical use of the water, it would seem hardly possible to show that the defendants caused it any material or actual damage by their use of the water for the lawful purpose of irrigation. In this practical age it would be unworthy of a court of justice to notice the fanciful injury resulting from depriving the eye of the gratification of seeing or the ear of hearing the full flow of the water. Those may be injuries in a certain sense, but they are of the kind to which the maxim, "*de minimis non curat lex*" applies, as it does to the planting of a tree, which, in some degree, obstructs my neighbor's light, or kindling a fire in my chimney which tends to lessen the purity of his air. So long as the plaintiff has enough for its lawful, practical uses, it ought not and can not be permitted to debar other riparian proprietors from applying so much water as they profitably can to agricultural purposes. It follows that the plaintiff lost no right, and the defendants gained none, by defendants using the water for irrigation. The plaintiff might safely concede the right to use the water for that purpose while it suffered no actual damage.

We have seen that whenever it was damaged, it objected and denied the right of defendants to use the water to its injury. This is enough to defeat the title alleged to have been acquired by adverse enjoyment.

A point made by the plaintiff is, that some of the defendants, who have entered and paid for their land, and received a certificate of purchase, but no patent as yet, have no title by virtue of which they can claim and exercise riparian rights. It is true that such defendants have not the strict legal title; but it is settled that the entry and payment and certificate thereof convey the equitable title. Thereafter the land ceases to be public, and the government has no right to sell it again, but holds the legal title in trust for the purchaser. The land

is no longer the property of the United States, and may be taxed by the State without violating the compact not to tax United States property: *People v. Shearer*, 30 Cal. 648; *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wal. 210; *Hughes v. United States*, 4 Wal. 232. They have also the actual possession as well as the beneficial estate or interest in the land, and as such possessors and equitable owners are entitled to enjoy all the incidents to the land and its ownership, as well as the land itself. The patent when issued relates back to the original entry, the inception of title, so far as is necessary to protect the purchaser's right to the land: *Id.*, and *Gibson v. Chouteau*, 13 Wal. 92. Upon these authorities it is evident that the plaintiff's objection is groundless. The defendants are, to all intents and purposes, the owners of the land, and entitled to riparian rights. So, too, we consider that the defendant, who has entered land under the Homestead Act and continues to reside thereon, being rightfully in possession in pursuance of a law of the United States, is entitled to use the water of the stream as other riparian proprietors may.

We must also hold, since the patent when issued will relate back to the inception of title, that is, the original entry and payment, that one who entered and paid for his land prior to the passage of the act of Congress of July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," has his land and the water upon it unaffected by that act.

We come next to the inquiry whether or not certain channels, creeks and sloughs, as they are called, are natural watercourses. Without reviewing the evidence here, it is sufficient to state that we find "Brockliss Slough," "Cottonwood Slough," "Rock Creek Slough," the "Old Channel," and "Dangberg Creek," to be natural watercourses, and that the defendants, through whose lands they pass, have a right to use the water naturally flowing in them in a reasonable manner, for irrigation and other lawful purposes.

Referring to "Dangberg Creek" and the "Old Channel," it appears that in former years so much water naturally flowed from the east fork into them as to flood and injure the farms. To remedy this, obstructions were placed in these channels, at their heads, and the water led into them from other points; in

the one case a little above, and the other a little below the old head. This slight change in the channels enables the defendants to control the flow of the water, and prevent injury to their farms, while it in no way damages the plaintiff. We do not regard these channels as any less natural watercourses since this change than they were before.

The next step is to determine what is the test of a reasonable use. To state the question in another way: The defendants having a right to make a reasonable use of the water for irrigation, when does their use become unreasonable? Mr. Justice Story has stated the rule as clearly as it can be stated, probably, in the following extract from his opinion in *Tyler v. Wilkinson*, 4 Mason, 397: "There may be, and there must be, allowed of that which is common to all, a reasonable use. The true test of the principle and the extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation or acceleration not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness subversive of common sense, nor into extravagant looseness, which would destroy private rights. The maxim is applied, *sic utere tuo ut non alienum laedas*." Chancellor Kent states the principle with equal clearness as follows: "All that the law requires of the party by or over whose land the stream passes is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream." This is the law and the test by which the question of reasonable use or not is to be tried. As a definition of this "common right," spoken of by Judge Story, the language of Mr. Baron PARKE, in *Embrey v. Owen*, 6 Ex. 353, may be profitably quoted. He says: "This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural

state; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side, to the reasonable use of the same gift of Providence." To the same effect is the language of Mr. Justice NELSON, in *Howard v. Ingersol*, 13 How. 426: "No proprietor," he says, "has a right to use the water to the prejudice of other proprietors, above or below, unless he has acquired a prior right to divert it. He has no property in the water itself, but a simple usufruct while it passes along. Any one may reasonably use it who has a right of access to it; but no one can set up a claim to an exclusive flow of all the water in its natural state; and that what he may not wish to use shall flow on till lost in the ocean."

From these authorities it appears that the use which is unreasonable, is such as works actual, material and substantial damage to the common right; not to an exclusive right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor. The rule leaves the common right equal in times of plenty and of scarcity. Because the river is low and there is not sufficient water to drive plaintiff's mill, the proprietors above can not be debarred from all use. They may still use the water, taking care to do no material injury to the common right of plaintiff, having regard to the then stage of the river. And at all times every proprietor may, in the exercise of this common right, consume so much water as is necessary for his household and domestic purposes and for watering his stock.

Applying the test to the facts now before us, we find that the defendants did, at the time stated in the bills, use the water unreasonably to the injury of the plaintiff. This much we think clear, and it would serve no good purpose to comment upon the many volumes of testimony. We find, also, that the defendants threaten, and will, unless restrained, continue to so use the water; indeed they insist now, and have throughout this litigation, on their right to use so much water as they need during the season of irrigation, without regard to the rights or wants of the plaintiff. This constitutes one of those continually recurring grievances which only a court of equity can adequately redress.

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When we come to consider the terms of the decree, we find it impossible, however desirable such certainty may be, to measure out to the defendants a specific quantity of water in cubic inches flowing under a given pressure as reasonable, or to designate a certain number of acres of land which a defendant may at all times reasonably irrigate, and restrict him to that quantity of water or number of acres. Counsel for the plaintiff, without admitting the correctness of any such standard for determining a reasonable use, was willing to take decrees permitting the defendants each to irrigate one hundred and sixty acres of land, but defendants not consenting to this it could not be done. The changes in the volume of the Carson river during the summer season, which naturally occur, are such that the quantity of water which a proprietor may reasonably consume varies continually. At times the melting snow gives an abundance for all, and the defendants can use it as they please, without any injury whatever to plaintiff. At other times a defendant might easily so apply the water in irrigating one hundred and sixty acres as to waste and diminish it, to the injury of plaintiff. Sometimes, indeed, there is so little water flowing in the river, that if none were used by defendants, in consequence of the evaporation and absorption during the passage over the rocky and gravelly bed for fifteen or twenty miles, intervening between the defendants' farms and the premises of plaintiff, enough would not reach the plaintiff's mill to be of any practical use. At such time there would seem to be no good reason for saying that the use of the water by defendants is injurious to the plaintiff. For these, among other reasons, we think no such arbitrary standard of reasonable use can be set up.

Our conclusions in the five cases now under consideration are as follows: That the plaintiff is seized and possessed of the lands described in its bill, and the mill situated thereon, and as incident thereto, is entitled to the rights of a riparian proprietor in the water of Carson river, flowing through and over said lands; that the defendants, with the exception of Charles Brodt, Godfrey Brodt, John Howard, Warren H. Smith and E. Lightle, are seized and possessed of the lands described in their answers, through and over which the waters of the east or west fork, or some one or more of the natural streams before men-

tioned, flow in their natural channel, and, as incident thereto, are entitled to the rights of riparian proprietors in the waters of the streams naturally flowing over their land, but are not entitled to any exclusive enjoyment of such waters, as against the plaintiff, by virtue of prior appropriation or adverse use; that between the first day of July, A. D. 1871, and the fourteenth day of August of the same year, the defendants, with the exception of E. Lightle, did use the waters of said streams unreasonably, to the injury of plaintiff; and that plaintiff is entitled to decrees against all of said defendants, excepting E. Lightle, perpetually restraining them from diverting the waters of Carson river upon their lands or elsewhere, so as to prevent the same from flowing freely to the lands and mill of plaintiff, to the extent necessary for the lawful uses and purposes of plaintiff in carrying on upon its said premises the business of reducing metalliferous ores, or other lawful business in which it may now or hereafter be engaged; the decrees to contain a proviso, in favor of all the defendants, except those named above as not owning lands on the stream; that nothing therein contained shall be construed to prevent them from using the water of said streams, naturally flowing through their land, for the purpose of irrigating said land, or other lawful purposes of a riparian character, to such an extent, and so far as such use shall not cause actual, material and substantial injury to the plaintiff in its use of the water, and shall not diminish or materially contribute to the diminution of the water of said streams, so that such diminution shall prejudice or cause material injury to the plaintiff in its practical application of the water on its said premises; and a further proviso that said defendants may at all times take and use a sufficient quantity of the water for their domestic and culinary purposes, and for watering their cattle. The decrees will also enjoin the defendants to take the water from said streams and apply it to its various uses upon said lands without unnecessary waste, and in the most economical manner consistent with its beneficial use, and return the surplus to the stream whence it was taken in like economical manner, and without unnecessary waste.

The defendant, E. Lightle, answered, denying that he had ever diverted any water, or that he threatened to do so, and

there is no proof against him. The decree must therefore be in his favor for costs.

Decrees are to be drawn up in accordance with the views herein expressed, with costs in favor of plaintiff against the other defendants, to be taxed by the clerk, and apportioned by one of the judges of this court, so that each defendant shall be liable for the amount apportioned to him and no more.

CREIGHTON V. EVANS.

(53 California, 55. Supreme Court, 1878.)

¹**Nominal injury to riparian rights.** The right of a riparian owner to have the water of a stream run through his land is a vested right, and any interference with it imports at least nominal damages, even though there be no actual damage.

Appeal from the District Court of the Thirteenth Judicial District, County of Tulare.

The case was tried by the court with a jury, and the verdict was for the defendant. Judgment was rendered accordingly. The plaintiff moved for a new trial, which was denied, and he appealed. The other facts are stated by the court.

ATWELL & BRADLEY, for the appellant, cited the Civil Code, Sec. 1422; Angell on Watercourses, pp. 97-109, 135, 450; *Corning v. Troy*, 40 N. Y. 191-204; High on Injunctions, Secs. 501-512; 1 Addison on Torts, pp. 8, 9, 10-72; Blanchard & Weeks' Leading Cases, pp. 719, 721, 753; *Ferrea v. Knipe*, 28 Cal. 340; Sedgwick on the Measure of Damages, pp. 45, note 2; 148; 153; *Attwood v. Fricot*, 17. Cal. 43; *Embrey v. Owen*, 6 Exch. 353.

E. J. & E. D. EDWARDS, for respondent.

BY THE COURT.

It is admitted by the pleadings that the water of Elk Bayou flowed in its natural channel through the plaintiff's land, and that the defendant devoted a portion of the water to his own

¹ See *Vansickle v. Haines*, 7 Nev. 249, with note to same; *Post WATER*.

land for purposes of irrigation, and other purposes. It is not averred that he is a riparian owner, and as such entitled to use any portion of the water. There is nothing in the record to indicate that the defendant was entitled to divert any portion of the water, and the court properly instructed the jury that the plaintiff was entitled to recover at least nominal damages, even though he had suffered no actual damage. But, at the request of the defendant, the court also instructed the jury that if the defendant diverted a portion of the water for a useful purpose—such as, for example, for domestic use—and that enough water was left in the stream for the use of the plaintiff for watering his stock, and for domestic purposes, and if the plaintiff was not damaged by the diversion, the verdict should be for the defendants. This was not only contradictory to the first instruction, but is erroneous in matter of law. So far as appears from the record before us, the defendants were not entitled to divert the water for any purpose, and the plaintiff was entitled to at least nominal damages.

Judgment and order reversed, and cause remanded for a new trial.

CATE V. SANFORD ET AL.

(54 California, 24. Supreme Court, 1879.).

Private water ditch enjoyed in common. An irrigating ditch, constructed, repaired and controlled by two or more persons, does not cease to be private property because the several persons interested in it have not accurately defined their rights therein, or in the waters flowing in it, nor because they have, by election, selected a person to distribute the water among those who have contributed to the construction and maintenance of the ditch, nor for both of those reasons combined.

Idem—No dedication presumed. Such a mode of construction and management of a ditch and its waters, although the irrigators may be numerous, does not operate as a dedication thereof to the public.

Idem—Statute concerning water commissioners, construed. Such a ditch would come within the exception contained in Sec. 6, Stats. 1877-8, by which the water commissioners of Los Nietos Irrigation District are forbidden to take possession and control of private ditches.

Appeal from a judgment for defendant in the Seventeenth District Court, County of Los Angeles. McNEALY, J.

The court found, with reference to the ditch referred to in the opinion, and other ditches from the same water source, "that since the construction of the said ditches respectively, as persons have bought and cultivated lands capable of irrigation therefrom, the same have, with the consent of all the parties, been constructed down to and upon such lands, and the same have been irrigated therefrom, the new parties contributing in the same manner toward the repair and expenses thereof as the original constructors, and taking like part in their respective management and control, and in all respects exercising the same rights," and "that the distribution of the waters on the said ditches has been regulated by the informal election of a water-master for each respective ditch, by the irrigators therefrom."

The other facts are stated in the opinion.

BICKNELL & WHITE and THOM & ROSS, for appellant, who was plaintiff below.

HOWARD, BROUSSEAU & HOWARD, and J. B. HOLLOWAY, for respondents.

BY THE COURT.

The plaintiff is, and for more than ten years last past has been, the owner in fee and in possession of a tract of land forming a part of the Rancho Ranchito, situated in Los Nietos township, in the county of Los Angeles, and bounded on one side by the San Gabriel river. About the year 1868, he, together with sixteen other owners of separate tracts of land upon that rancho, constructed the ditch in controversy, called the "Cate Ditch," by which they conducted water from the river San Gabriel upon their several tracts of land, for the purpose of irrigating the same; and he and they have continued to use the ditch for that purpose, from that time up to June, 1878, when the defendants took the exclusive possession of the ditch and the waters therein flowing.

The expenses of the construction and repair of the ditch have been borne by the respective parties, in proportion to the quantity of land irrigated by them. Other persons, desiring to irrigate their lands, have continued the ditch to and upon their respective tracts of land, and they have contributed to the construction and repairs in the same manner, and have had the same management and control of the ditch as those who originally constructed it. The distribution of the waters has been regulated by a water-master, elected by those who irrigated from the ditch.

The plaintiff seeks to enjoin the defendants from assuming the possession or control of the ditch, or the water flowing in it, or in any manner interfering with the same.

The defendants justify their possession and control of the ditch and water, under the provisions of the act of March 20, 1878, entitled "An act to provide for and regulate irrigation in the township of Los Nietos, in the county of Los Angeles (Stats. 1877-78, p. 374), under which they were appointed water commissioners and overseers of the Los Nietos Irrigation District. The sixth section of the act provides that the commissioners "shall proceed to take possession of and control of all the watercourses, ditches, dams, aqueducts, flumes, reservoirs and irrigating structures and works in said district (except such as are owned by private parties, or by companies or corporations legally organized under the laws of this State), and shall determine the amount of water which shall be given and used as an irrigating head, and cause the same to be measured and distributed to the irrigators; to use all means to cause the water of said district to be utilized to the best interest of the irrigators." Power is conferred upon the commissioners to acquire by conveyance, or by actions for condemnation, rights of way for ditches, dams, reservoirs, and canals; and the act contains many provisions in aid of the above mentioned powers.

The court found as a conclusion of law, that the ditch was a "neighborhood and *quasi* public" ditch, and was not owned by private persons, within the meaning of the above mentioned act. An irrigating ditch, constructed, repaired and controlled by two or more persons, does not cease to be private property and become public property because the several

persons interested in it have not accurately defined their respective rights therein or in the water flowing in it, nor because they have, by election or otherwise, selected a person to distribute the water among those who have contributed to the construction and maintenance of the ditch, nor for both of those reasons combined. No principle of law has been cited by virtue of which that mode of construction and management of such a ditch and its waters would operate as a dedication of the ditch or its waters to the public. They have not been expressly granted to the public; and if they have not been dedicated to public use, they remain private property. In our opinion the case falls within the exception mentioned in the sixth section of the act—that the ditch is private property.

But if the ditch is only a *quasi* public ditch, it must, to some extent and in some measure, be a private ditch; for the qualification given necessarily implies that it is not entirely a public ditch, and that private parties own some right, title or interest therein; and if that be so, they can not be deprived of such right, title or interest, by the summary process of taking possession of the ditch, adopted in this case.

The facts found by the court entitle the plaintiff to the relief prayed for in his complaint.

Judgment reversed and cause remanded, with directions to the court below to order the injunction to issue as prayed for in the complaint. Remittitur forthwith.

MUNROE ET AL., Appellants, v. IVIE, Respondent.

(2 Utah, 535. Supreme Court, 1879.)

Appropriation of water. Irrigating companies can not control running water except by legal appropriation thereof, and any person, a stranger to such company, has a right to appropriate water not legally appropriated by others.

Territorial control of water, limited. In this country lands are open to all persons, as also the appropriation of running waters, and the Territorial Legislature has no power to enact laws that will permit an irrigating company to control or manage the water of any part of the Territory in disregard of the rights of individual claimants.

Appeal from the First Judicial District Court.

The facts appear in the opinion of the court.

SHEEKS & RAWLINS, for appellants, who were plaintiffs below.

Priority of appropriation in this Territory and other western States and Territories, where artificial irrigation is required, gives the indefensible right to the use of water: *Basey v. Gallagher*, 20 Wall. 681; *Atchison v. Peterson*, 20 Wall. 507; *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 143; *Barnes v. Sabron*, 10 Nev. 217; *Smith v. O'Hara*, 43 Cal. 371; *Hoffman v. Stone*, 7 Cal. 49; *McDonald v. Bear River*, 13 Cal. 220; *Kelly v. Natoma Water Co.*, 6 Cal. 105; Rev. Stat. U. S., § 2339.

This right applies to the full extent of the quantity of the flow of the water so appropriated, and for the periods of time in each year, month, week or day during which the appropriation is made: *Smith v. O'Hara*, 43 Cal. 371; *Basey v. Gallagher*, 20 Wall. 681; 11 Cal. 143; 10 Nev. 245.

This right is subject to the condition that the appropriation must be for some useful purpose, and that ordinary economy must be employed in the exercise of the use: *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Basey v. Gallagher, supra*; *Davis v. Gale*, 32 Cal. 26; 10 Nev. 246.

An application of the use to a new but useful purpose does not affect the right. In this respect a change or an extension of the application of the water is unimportant. To illustrate: If with a given quantity of water the party had irrigated and matured crops upon one acre of land, but by a change of conditions he was afterward, with the same water, able to mature crops upon two acres, and did so, this circumstance would not break the continuity of his right to use all the water. The right extends to the quantity of the water, not to its application: *Davis v. Gale*, 32 Cal. 26.

It clearly results from the above, that whatever labor plaintiffs and their predecessors expended to obtain water, such water having been unappropriated, and they having been in possession of objects to which it could be usefully applied,

they, and not the defendants, would be entitled to the benefits of this labor: 10 Nev. 244.

No question of riparian rights is involved in this case, because defendant showed no title: *Basey v. Gallagher*, 20 Wall. 681.

The court should administer the law according to the strict right, the evidence in respect to it not being conflicting. A comparison of the value of conflicting rights would be a novel mode of determining their legal superiority: *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

P. T. VAN ZILE, for respondent.

No brief on file.

BOREMAN, J., delivered the opinion of the court.

This is a suit for injunction to restrain respondent from appropriating water from Maple Grove creek. Upon the hearing of the case upon its merits in the court below, judgment was given for respondent, and thereupon appellant brought the case to this court.

The judgment of the district court is objected to mainly upon two general grounds:

First.—It is alleged that the finding of fact and decision of the court are contrary to the evidence. The statement shows that the evidence was conflicting. Where there is a substantial conflict, as appears here, the court will not disturb the finding.

Second.—It is alleged that the conclusions of law and decree are not the legal results of the facts found. The facts show, substantially, that in 1863 the respondent went upon the ground he now claims water for, and took steps to hold it, and in 1864 he appropriated water from Maple Grove creek, upon this land; that he was driven off by the Indians in 1865, and upon the close of the Indian war, in 1866, he returned to the land and began using the waters of said creek for irrigating the land, and has continued to do so each year until the present time. In 1864, when he first appropriated the water of the creek, there was a settlement of thirteen families at Scipio,

who were appropriating water from the same creek, to irrigate not to exceed two hundred acres of land. Since that time the people of Scipio had improved the channel of the creek, and, by ditching, have brought water from five springs which did not feed Maple Grove creek, so that now they have water for 2,400 acres, and irrigate that much. From this time the number of families at Scipio has increased; new settlers were admitted and allowed to take the water. Whilst new settlers were thus allowed to appropriate these waters, the defendant (respondent) was appropriating the water above them at his ranch. This yearly admission of new settlers into Scipio, and their appropriation of the waters, would seem to make it clear that there was no scarcity of water. If new settlers were thus allowed, without objection, to appropriate the water below respondent, we can see no reason why he could not have the same right. Water is something that the appellants could not control in any other way than by appropriation. They could not go and dig ditches and bring water down, and let it run to waste. If they failed to appropriate it any stranger could appropriate it, and it was not necessary that such stranger should be a member of the irrigating company, nor could such company injure or trample upon his rights. This is a free country, and the lands are open to all, and the appropriation of the water is open to all, and the legislature can not pass any law that will put it into the power of an irrigating company to control and manage the waters of any part of the Territory, regardless of the rights of parties. Nor will the court allow irrigating companies to become engines of oppression. Taking all of the evidence in this case together, we think that the court below was justified in its findings and conclusions of law.

The judgment is affirmed with costs.

HUNTER, C. J., and EMERSON, J., concurred.

COFFMAN, Respondent, v. ROBBINS, Appellant.

(8 Oregon, 278. Supreme Court, 1880.)

Rights of lower proprietor. Each riparian proprietor has the right to have the water of a stream running in a defined channel continue so to flow, except so far as the same may be appropriated for domestic use, stock, and reasonable irrigation.

¹ Parol division of water enforced. Where riparian proprietors have divided the water of a stream by mutual consent, and each party has constructed ditches and enjoyed the water for years under such parol agreement, it is an agreement which will be enforced in equity and each party limited to his agreed share.

² Purchaser takes notice of ditches. A party purchasing land with water thereon distributed by ditches, will be presumed to have purchased with knowledge of how the water was divided.

³ Costs divided, neither party being without blame.

Appeal from Unatilla County.

This is a suit by the respondent to enjoin the appellant from diverting any part of a certain stream of water from respondent's premises, and from preventing any more than one third of such flowing upon the respondent's premises at the southeast corner of his farm, and for damages.

The respondent alleges that two springs rise on the lands of appellant, the waters of which unite and form a stream which runs through the lands of Daniel Simmons, to a point distant about one hundred yards south of the north boundary of Simmons' farm, at which point the waters divide and form two separate channels, both of which channels run onto the premises of the appellant, Robbins, in the said northwest quarter of section six, near the southwest corner of said land, and from there, when unmolested, passed onto the northeast quarter of section one, of respondent's land, in several different channels, one of which channels passed onto said land at a distance of about two rods from the southeast corner of his farm, which channel carried about one quarter of the water running from said springs. The second and principal channel flowing from said springs passed onto respondent's land at a distance of about twenty-six rods from his southeast cor-

¹ 420 *Mining Co. v. Bullion Co.*, 3 Saw. 634; *Post* PATENT.

² *Lawrence's App.*, 7 M. R. 542; *Highland Co. v. Mumford*, 2. M. R. 3.

³ *Irwin v. Davidson*, 7. M. R. 237.

ner, which channel carried about one half of the water flowing from said springs, and two smaller channels formed by the waters of said springs passed onto his land near the center of his east line, which said two last mentioned channels carried about one quarter of the water flowing from said springs; and that all the water flowing from said springs passed onto respondent's land in said four channels, and from there flowed in a northerly direction in several different channels, until they reached the west half of his home farm, where they again united and formed one main channel, which passed off from his said home farm on the west side thereof, from whence it ran onto some railroad land which is in the possession of respondent, and from thence to some land owned by one James M. Leezer. The said waters, before any ditches were dug, caused about sixty acres of respondent's land and about forty acres of appellant's land to be swampy, and to be grown over with tules.

That during the year 1864, two ditches were cut, distant about five feet apart in a north and south direction, on the line dividing the home farm of respondent from the northwest quarter section six, of appellant, which said last described land was then the property of one John McCoy, and that a wall of sod and dirt was built between said ditches, said wall being about five feet thick at the bottom, about four and a half feet high, and running up tapering to about the width of two feet at the top, and that said ditches were cut and wall erected for the purpose of forming a fence between the premises of respondent and the said John McCoy. That said wall prevented the water from said springs from flowing onto respondent's land in any of its natural channels, but that by mutual consent and agreement between himself and John McCoy, and other persons who afterward owned said land adjoining on the east, he had the privilege of bringing all the water that he desired to make use of, onto his premises, through a ditch which runs onto his land at his southeast corner, and which ditch extended in an east direction from said southeast corner between the lands of appellant and Daniel Simmons.

The appellant acquired title to the land adjoining respondent on the east in 1873, and that at intervals since

said time he has diverted about one half of the water flowing from said springs away from the lands of the respondent, and that said waters so diverted were never allowed to flow onto respondent's home farm, but passed around the same on other lands adjoining thereto, and that a large portion of said waters were flowed by appellant into a lane through which a country road had been located, and that respondent never consented to said diversion, but frequently objected thereto.

That in February, 1876, appellant diverted all the water flowing from said springs away from respondent's southeast corner, by means of ditches which he dug for that purpose, and by deepening ditches which had already been dug, and caused it to flow into the most northerly of the channels formed by the spring branch, from whence it flowed onto respondent's land through an aperture in the wall, between the lands of respondent and appellant, which had been caused by a flood of the Umatilla river in the year 1876, and which aperture had never been filled with dirt, but across which a fence built of rails and poles had been constructed. That respondent has thereby been deprived of the use of said water for the purposes of irrigation and watering stock, and has been greatly damaged by means of the increased flow of water upon his premises in said northerly channel, etc.

Appellant in his answer, in substance, claims that the waters of the spring branch, prior to the digging of ditches, all reunited on his land and flowed onto respondent's land, through the most northerly of the channels described in the complaint, and that the water which flowed northerly on respondent's southeast corner came from a slough which has its source in Daniel Simmon's farm, and which does not naturally unite with the waters of the spring branch until after it passes onto respondent's land. That Daniel Simmons and respondent, acting together, have constructed ditches on Simmons' land, which have changed the natural flow of the waters of the spring branch, and that appellant has thereby been injured. That Simmons has built a dam across the spring branch and backed up the water into appellant's cellar. That respondent, about two years ago, constructed an embankment across the north channel described in the complaint, by means of which the waters of the spring branch have been backed up

on appellant's land and his meadow overflowed, to his damage, etc.

J. H. TURNER, and DOLPH, BRONAUGH, DOLPH & SIMON, for appellant.

LUCIEN EVERTS, for respondent.

By the Court, BOISE, J.

There are in this case no legal propositions which present any difficulty. If the stream of water in controversy was running in a well defined channel through the lands of the respective parties, they would each have a right to have it continue to flow in its natural course without diminution, except so far as the same might be legally used by each riparian proprietor, while passing through his premises, for domestic use, stock and reasonable irrigation. But from the evidence, it appears that this stream, before its flow was disturbed by ditches, spread out on the lands of both parties into a swamp, with no fixed and definite channels, especially when the water was flush. It entered the lands of the appellant by two channels, and the evidence is conflicting and uncertain which carried the most water at the time the first ditch was made, which is marked on the map in the brief as ditch S. We think, however, that the evidence tends to show that prior to the making of this ditch, which was about the year 1861, some of the water flowed about the southeast corner of Coffman's land, and stood in stagnant sloughs during the dry season. This appears from the direct testimony of some of the early settlers, and from the testimony of the surveyor, F. E. Habershaw, who shows from the elevations of the ground that the water could flow about said corner, and he traces old channels or swales leading around that point; and the undisputed fact that this stream spread out and made a swamp which produced tules or rushes near this locality, shows that the water must have gone there and remained during the season. The testimony, however, tends to show that before ditch S was made the surplus water flowed on in different channels across the lands of appellant, and most of it passed onto the land of respondent at or about the point marked "levee" on the map.

But the evidence is very uncertain as to which channel then carried the most water. This ditch S was cut across the west channel and dammed it up, so that from that time on for many years the water ceased to flow down the west channel, and consequently had a tendency to obliterate all the channels which formerly carried the water about respondent's southeast corner. It appears that the respondent, soon after ditch S was dug, extended it to his southeast corner, and the water ran there for years. It was afterward agreed between the respondent and Martin Robbins, who owned the land now owned by appellant, that respondent might divert a part of the water through ditch S to his southeast corner, and Martin Robbins might convey a part of the water to his barn, which was done by ditch E, he (Robbins) joining said ditch with Simmons' at his line. This continued for some five years, when the parties quarreled about the water, each claiming a right to use it all; Coffman claiming a right to take it all to his southeast corner, and Robbins claiming the right to have it all flow through his land wherever he chose. It is claimed that if Coffman had been taking a part of the water to his southeast corner, it was by a license which was subject to be revoked by Robbins at any time. It is also claimed that if he had been taking the water by an agreement to divide the water, which had been acted on by both parties for a number of years, such agreement is by parol and not binding, being void by the Statute of Frauds. And, also, if it was binding so far as to be upheld by a court of equity, both parties having repudiated it when they quarreled, it became void by their acts.

We think that if the parties divided this water by mutual consent, and then, on pursuance of such agreement, Coffman dug ditches to receive one half of it and dispose of it at his southeast corner, and Robbins did the like on his land, and each took and enjoyed the water for years under this agreement, such a contract should be upheld in equity, for the agreement was a legitimate and proper one, and as the consideration (which was the digging the ditches and taking care of the water) was paid and the possession given, the agreement could be enforced in equity; and if these equitable rights once attached they would not be destroyed by a mere

quarrel between the parties, for neither gained or lost a right by this disagreement. Such disagreement is only evidence tending to show that the agreement never existed, or had not been performed. And we think the evidence shows that the agreement was made and that the rights under it still exist, unless Thomas Robbins bought without notice. The evidence shows that when he purchased the land this water was running as divided in the ditches, and Coffman was in possession taking his half to his southeast corner, and Robbins must be presumed to have purchased knowing this fact. We think, therefore, that these parties have each a right to one half of this water, as decreed by the circuit court.

We also think that the evidence shows that both parties have been at fault in seeking to evade the agreement by which the water was divided, for it appears that the respondent claimed that he had a right to take all the water to his southeast corner and deprive Robbins of all the water, and that both parties have been injured by turning the water from the ditches and letting it flow at will. It seems to have been an unfortunate quarrel between neighbors, by which both have suffered. And we think that while the court is called on to settle the rights of the parties to the water, as neither party is without fault, and both have been injured, neither should recover damages, and the decree will be modified in this respect, and appellant will be entitled to costs in this court, and respondent in the circuit court.

1. Use of water for twenty-one years for irrigating purposes gives title by prescription at common law: *Wheatley v. Chrisman*, 24 Pa. St. 298; *Post* NUISANCE.

2. The right to divert and appropriate water for irrigation recognized and allowed: *Basey v. Gallagher*, 1 M. R. 683; *Barnes v. Sabron*, 4 M. R. 673.

3. The right to the water as affected by issue of United States Patent: *Vansickle v. Haines*, 7 Nev. 249; *Post* WATER.

4. Irrigating land, considered as evidence or notice of claim and possession: *Courtney v. Turner*, 12 Nev. 345.

5. Irrigating ditch protected by injunction from injury by miners: *Rupley v. Welch*, 4 M. R. 243. And see *Derry v. Ross*, 1 M. R. 1.

6. The limit of the right of an irrigating appropriator is the amount which he can use; not the amount which he turns out of its channel and wastes: *Dick v. Caldwell*, 14 Nev. 167.

7. The measure of capacity of a ditch: *Barnes v. Sabron*, 4 M. R. 673.

8. Pollution of irrigation ditches by mills: *Crane v. Winsor*, 2 Utah, 248; *Post* NUISANCE. By mines: *Wheatley v. Chrisman*, 24 Pa. St. 298; *Post* NUISANCE.

9. Claim of irrigator to allow his waste water to overflow upon lands of others below: *Blaisdell v. Stephens*, 7 M. R. 599.

10. Fraudulent allegation of ownership of water: *Banta v. Savage*, 7 M. R. 113.

11. Ditch rights as appurtenances to land: *Id.*; *Smith v. Logan*, 1 W. C. R. 391.

12. Contest between ranch and municipality as to right to water for irrigation: *Feliz v. Los Angeles*, 58 Cal. 73.

13. Prior appropriator may not drain an entire stream, even though he may need all the water: *Learned v. Tangeman*, 3 West C. R. 153.

14. The property in ditch rights considered: *Tripp v. Overocker*, 7 Colo. 72.

15. Upon the question of the rights of riparian proprietors as affected by the necessarily hostile doctrine of appropriation, see *Farley v. Spring Val. Co.* 58 Cal. 142; *Lux v. Haggin*, 4 W. C. R. 256; *Vansickle v. Haines*, 7 Nev. 249; *Post* WATER; *Basey v. Gallagher*, 1 M. R. 683; *Atchison v. Peterson*, 1 M. R. 583. It is impossible to sustain the doctrine of riparian rights as expressed in *Union Co. v. Ferris*, and *Union Co. v. Dangberg*, 8 M. R. 90, 113, with the cases which maintain the right of appropriation: R. S. M.

16. Mandamus allowed to compel Ditch Company to supply water: *Golden Co. v. Bright*, 5 West C. R. 805.

TRAFTON V. NOUGUES.

(4 Sawyer, 178. Circuit Court, District of California, 1877.)

Transfer of causes. Under the clause "arising under the constitution and laws of the United States," found in section two, 18 Stat. 470, of the act to determine the jurisdiction of the United States courts, passed March 3, 1875, only such suits can be transferred from the State to the national courts as involve a disputed construction of the constitution and laws of the United States.

¹**Federal jurisdiction in mining suits.** In an action to recover for trespass upon a gravel gold mining claim, and seeking an injunction restraining the working of the claim by defendant, a petition was filed by the defendant for the removal of the cause to the United States court, in which it was alleged that the defendant located and held his claim under the several acts of Congress relating to the subject, but it did not appear that any question was involved other than is usual in the trial of rights to mining claims or which might not be determined by the local laws, rules and customs, without reference to the acts of Congress: *Held*, that the petition did not show such a state of facts as to warrant the transfer, and the case was, on motion, remanded to the State court.

Petition for transfer—What it should state. A petition for transfer should state the exact facts, and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself, from the facts, whether the suit does really and substantially involve a controversy within its jurisdiction.

Petition alleging legal conclusion, insufficient. An allegation in a petition for removal that "the rights of the plaintiff as against defendant must be determined under the laws of Congress of the United States," is a statement of a legal conclusion rather than a fact; it states merely the opinion of the petitioner and will not justify a transfer.

Motion to remand case to the State court, whence it came, on the ground that it does not appear from the facts alleged, either in the pleadings or the petition asking a transfer, that the case is one arising under the constitution or laws of the United States, within the meaning of the act of Congress of March 3, 1875.

C. A. TUTTLE, for motion.

M. MULANY, *contra*.

SAWYER, Circuit Judge.

I have had no little difficulty in satisfactorily construing

¹Transfer of suit supporting adverse claim: *Chambers v. Harrington*, 111 U. S. 350; *Frank Co. v. Larimer Co.*, 1 M. R. 170.

this act. In the broad sense claimed by some, nearly all cases relating to title to lands would be swept into the national courts; for in the new States, in every action of ejectment involving a question as to the real title, one party or the other goes back to a patent or other grant under the laws of the United States. Since the passage of the act of Congress of 1866, and subsequent acts upon the same subject, expressly declaring the public lands to be free and open to exploration and occupation for mining purposes, subject to the local laws, regulations and customs of miners, also authorizing a sale and patent to parties establishing a right under such local laws, regulations and customs, it seems to be claimed, on this broad principle, that all suits relating to disputes about mining claims may be transferred to the national courts. But, clearly, the great majority of such cases only involve a litigation of precisely the same questions as were litigated in those classes of cases for the many years since the acquisition of California prior to the passage of those acts of Congress; and they turn upon no disputed construction of the constitution or statutes of the United States. In fact, where a patent is authorized to be issued to the possessor under these acts in a contested case, the statute refers the parties to the ordinary tribunals of the country to determine, under the local laws and customs, irrespective of the acts of Congress, which party is entitled to the mining claim, and the patent issues to the party so determined to have the right: *The 420 Mining Company v. The Bullion Mining Company*, 3 Sawyer, 634. Thus the rights of the parties are determined by the laws, regulations and customs of the locality outside the acts of Congress, without any discussion or controversy as to the construction of those acts. Since some of this class of cases transferred to this court were retained, but with no little hesitation, the Supreme Court of the United States has decided several cases which afford a rule for the future, and which, it seems to me, exclude jurisdiction in many cases which the bar appears to have supposed could be transferred. The case of *McStay v. Friedman*, 92 U. S. R. 723, was a case in which one of the parties relied: 1. On the Statute of Limitations; 2. On title acquired through the city of San Francisco, under the well known Van Ness Ordinance, and the act of the leg-

islature confirming it. On a writ of error to the State court, it was sought to sustain jurisdiction of the United States Supreme Court, on the ground that the title derived through the city depended upon the act of Congress of 1866 (14 St. 4), granting the land to the city, in trust for those who held under the ordinance of the city, State statutes, etc.

The court says: "At the trial no question was raised as to the validity or operative effect of the act of Congress. * * * The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error, and this did not depend upon the constitution or any treaty, statute of, or commission held, or authority exercised under the United States." *Romie v. Casanova*, 91 U. S. R. 380, is a similar case. At the present term of the Supreme Court, in a case which was actually transferred from the State court to this court, under section 2 of the act of 1875, the same ruling was made. One party claimed certain lots in San Francisco, by virtue of possession, in pursuance of the provisions of the Van Ness Ordinance and the statutes of the State, and of the United States, confirming said title; while the city claimed the same as being part of the public squares reserved and set apart for public purposes in pursuance of the same ordinances and statutes. After the transfer a demurrer was interposed to the jurisdiction of this court, on the ground that it presented no question arising under the act of Congress, the rights of the parties depending upon the construction of the ordinances of the city and the State statutes alone. On the other hand, it was earnestly urged that it was necessary to construe the act of Congress in order to find out who the beneficial grantee intended by the act of Congress was. The court, however, held that the act of Congress referred the question as to who was entitled to the land to the city ordinances and the statutes of the State upon the subject, and that their rights must be determined by a construction of those ordinances and statutes. The Supreme Court affirmed this ruling at the present term, thus holding that the same principle adopted in relation to the section providing for writs of error to the State courts, is, also, applicable to cases of transfer from the State to the national courts, under section 2 of the act of 1875; that is to say, that unless

there is some contest as to the construction of the act of Congress, there is no jurisdictional question in the case: *Hoadley v. San Francisco*, 94 U. S. R. 4.

So with reference to mining claims. The act of Congress grants certain rights to those who discover, take up and work mining claims. But it refers the parties to the local laws of the States and Territories, and to the rules, regulations and customs of miners of the district where the mines are situated, for the measure of their rights. If a dispute arises, as in the cases referred to, the act of Congress refers the parties to the ordinary tribunals to determine it by the local laws and customs, and not by the act of Congress. Upon the trial of the right to a mining claim, precisely the same questions are tried, and they are determined by the same laws and customs that were invoked as the measure of the rights of the parties before the act of Congress had been passed. Clearly, the great mass of these cases can not involve the discussion or any dispute as to the construction of any act of Congress; and when they do not, under the decisions cited, this court is without jurisdiction, so far as this provision of the act is concerned. Where the controversy is upon matters other than the construction of the constitution or an act of Congress, the "correct decision" of such controversy can not possibly "depend upon the right construction of either." No controversy can possibly arise upon the construction of an act of Congress, where all parties agree as to its construction. There may be a contest as to other matters, but not as to the construction of the constitution or laws in such cases.

This action was brought in the State court in Placer county, to recover for trespass upon a gravel gold mining claim, and seeking an injunction restraining the working of the claim by defendant. There is no fact alleged, either in the complaint or the petition for transfer, indicating that there is any question involved other than those that usually arise in a trial of a right to a mining claim. And it affirmatively appears from the issues stated in the petition that such are in fact the questions to be tried. It is alleged generally in the petition, it is true, that defendant located and held his claim under the several acts of Congress relating to the subject. But this is no more than can be said, in a general sense,

of all mining claims since the passage of the several acts referred to. But, as we have seen, that does not necessarily, nor even ordinarily, in this class of cases, involve any question of disputed construction of the act, or any right or question which is not to be determined by the local laws, rules and customs, without reference to the acts of Congress, precisely as they were before there was any such act in existence.

The only other allegation is, that the "right to said mining ground by plaintiff depends upon the laws of Congress, and the right or title of defendant to said mining ground aforesaid, must also be determined by the acts of Congress under which defendant and petitioner claim title; and that the rights of the plaintiff as against defendant must be determined under the laws of Congress of the United States." This is in substance two or three times repeated; but it is only the statement of a legal conclusion rather than a fact; and a conclusion manifestly founded upon the general idea that all mining claims are so held; that an action relating thereto involving the rights of the parties to the mine necessarily arises under the acts of Congress within the meaning of the act giving jurisdiction to the national courts—an erroneous conclusion, if I am right, in the views before expressed. These allegations express merely the opinion of the petitioner that a jurisdictional question will arise. In my judgment, such averments are insufficient to justify a transfer, or retaining the case when brought here. The precise facts should be stated out of which it is supposed the jurisdictional question will arise; and how it will arise should be pointed out, so that the court can determine for itself whether the case is a proper one for consideration in the national courts. Otherwise the administration of justice will be greatly obstructed, and intolerable inconveniences be the result. Under the fifth section of the act, it is made the imperative duty of the court, at any stage of the proceedings, when it appears that "such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction," to stop the proceeding and remand the case. Where a suit presents no disputed construction of an act of Congress; where there is no contest at all as to what the act means, or what rights it gives; where the only questions are as to what are the local mining

laws, rules and customs, and as to whether the parties have in fact performed the acts required by such local laws, rules and customs, how can it be said, in any just sense, that such a suit "really and substantially involves a dispute or controversy" arising under an act of Congress? The location of the mine involved in the case is more than one hundred and fifty miles from San Francisco, where the court is held, and many other cases may arise in this State, Nevada, and Oregon, in regard to claims lying from three to five hundred miles distant from the place where the national courts are held, and between which places the means of communication are by no means easy or cheap. Generally, in this class of cases, the testimony rests mainly in parol, and there is a multitude of witnesses. The expense of prosecuting or defending such suits at a great distance from the mines would be enormous. If the court should accept a petition containing a bare statement of the opinion of the petitioner, that the rights of the parties are derived under an act of Congress, as in this case, the result in most cases would be that the court would not be able to determine whether the case "really and substantially involves a dispute or controversy properly within the jurisdiction of the court," until the close of the testimony, when it would be necessary to remand the case at last. Such results would largely obstruct the due administration of justice, and work an intolerable inconvenience to honest suitors. Besides, it would encourage transfers of cases over which the court has no jurisdiction, by unscrupulous parties, for the very purpose of deterring the adverse party from pursuing his rights by reason of the delays, inconvenience and enormous expense of prosecuting an action of this class at a great distance from home. These difficulties would be especially onerous in cases relating to mining rights, where time is often as important as the right in the several large States of the Pacific coast and interior of the continent, and where a court is held at but one point. A single State, in some instances, it must not be forgotten, contains more territory than all the Middle and New England States together.

In view of these, in my judgment, weighty considerations, therefore, I think it of the highest importance to the rights of honest litigants, and to the due and speedy administration

of justice, that a petition for transfer should state the exact facts, and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself, from the facts, whether the suit does really and substantially involve a dispute or controversy within its jurisdiction.

Whenever, therefore, the record fails to distinctly show such facts in a case transferred to this court, it will be returned to the State court, and under the authority given by section 5, at the cost of the party transferring it. If I am wrong in my construction of the act, and the recent decisions of the Supreme Court, the statute, section 5, happily affords a speedy remedy by writ of error, upon which this decision and the order remanding the case may be reviewed without waiting for a trial, and the question may as well be set at rest in this case as in any other. It is of the utmost importance that a final decision of the question be had as soon as possible. If counsel so desire, I will order the clerk to delay returning the case till they have an opportunity to sue out and perfect a writ of error.

Let an order be entered returning the case to the State court whence it came, with costs against the party at whose instance it was brought here.

THE EUREKA CONSOLIDATED MINING CO. v. THE RICHMOND MINING CO.

(5 Sawyer, 121. U. S. Circuit Court, District of Nevada, 1878.)

¹ **No jurisdiction in lower court to allow injunction pending appeal from order of dissolution.** The plaintiff having obtained a judgment at law for the possession of a mine and at the same time in an equity suit obtained a perpetual injunction, the defendant appealed from this decree and also from an order in the same case dismissing the defendant's cross-bill and dissolving the temporary injunction issued thereon, and gave bonds necessary to operate as a supersedeas. After the appeal the plaintiff continued to work the mine, and the defendant, upon affidavit stating the appeal, supersedeas and continued working by plaintiff, applied for an order restraining further work pending the appeal: *Held*, that as the plaintiff was not attempting to do anything by

¹ *Eldridge v. Wright*, 7 M. R. 418.

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virtue of the decree, there was nothing to supersede; that as the decree was absolute and final, the case was ended in the court below and its jurisdiction exhausted.

Statute construed. Section 1182 of the Statutes of Nevada relates to proceedings in a case pending, over which the court still has control. This case having gone beyond the reach of the court, the statute has no application.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

The Eureka Consolidated Mining Company brought an action against the Richmond Mining Company to recover possession of a portion of a silver mine. It also filed a bill on the equity side of the court against the same defendant, alleging ownership of the portions of the mine sought to be recovered in the action at law; that defendant was in possession, working the mine and carrying away the ore, and praying an injunction pending the litigation, and that upon the hearing the injunction be made perpetual. A temporary injunction was issued. The defendant in these actions thereupon filed a cross-bill in the equity suit, alleging that the complainant in the original bill was also in possession of, and working, a portion of the mine in controversy, and praying an injunction, which was also temporarily granted. The parties then waived a jury in the law case, and the law case was tried, and the bill and cross-bill in equity were heard at the same time, during the March term, 1877, upon the same evidence, before Mr. Justice FIELD, SAWYER, Circuit Judge, and HILLYER, District Judge, the cases having been prepared and argued on both sides with consummate elaboration and ability. The court found for the plaintiff in the law case, and gave judgment for the possession of the mine; and in the equity case a decree was entered for the complainant in the original bill, making the injunction perpetual, and a decree dismissing the cross-bill and dissolving the temporary injunction issued thereon, and for costs. The decree of dismissal was absolute, without any limitation or qualification. The case is reported in 4 Saw. 302, where the facts are fully stated. Both parties had drifts running in various directions through the lode on different levels. The Richmond company took an appeal in the equity case, sued out a writ of error in the action at law,

and gave the bonds necessary to operate as a supersedeas. After the appeal the Eureka company continued to work the mine, and extended its drift on one of its lower levels so as to cut the body of ore in what is known as the Potts Chamber, as indicated in the report of the case in 4 Saw. 304, being the body of ore which the Richmond company was working at the time of the institution of the actions; but did not enter or take possession of, or interfere with any of the Richmond company's shafts, winzes, or drifts. Thereupon, at the March term, 1878, of the circuit court, the Richmond company, upon affidavits stating the appeal, supersedeas, and the acts of the Eureka company in working the mine in the disputed territory, applied for an order restraining the further working of the mine pending the appeal. It was claimed on the argument, that the working of the mine, although not a technical, was a substantial violation of the supersedeas; and that the court, for the purpose of preserving the subject-matter in dispute pending the litigation, should issue the order sought. Separate notices of the motion were given in the suit in equity and action at law.

J. J. WILLIAMS and CRITTENDEN THORNTON, for the motion.

S. HEYDENFELDT, JOHN GARBER and H. I. THORNTON, *contra*.

By the Court, SAWYER, Circuit Judge.

We will consider the equity case first. In this suit, upon the final hearing, the preliminary injunction was dissolved, and the cross-bill of the Richmond company dismissed absolutely without limitation or qualification, the decree enrolled, and the term adjourned. An appeal to the Supreme Court was taken in the proper time and form to operate as a supersedeas; but there was nothing to supersede except the decree for costs. The court granted no affirmative relief on the cross-bill. It simply denied the relief asked by the Richmond company, and dismissed the bill out of court. The Eureka company was not doing anything under or by virtue of the decree. It was not proceeding to collect the costs, either by execution or otherwise. The case was ended in this court, the jurisdiction exhausted, and the term adjourned. There was no longer any

case pending in the court in which any order could be made. The court, therefore, has no further jurisdiction in the case except to execute the decree for costs when the supersedeas is removed, if it should be removed, or till the decree is reversed on appeal to the Supreme Court, and the cause thereby reopened upon the receipt of the mandate from the appellate court. To issue a restraining order would be to exercise a new original jurisdiction without any suit pending in which it could be issued. The cases of *Galloway v. The Mayor, etc., of London*, 3 De Gex, Smith and Jones, 60, and *Coleman v. Hudson River Bridge Company*, 5 Blatchf. 56, are in point. The former case was a bill to restrain the corporation of London from taking certain property under statutory powers. The master of the rolls dismissed the bill, and the order of dismissal was affirmed on appeal, the lords justices differing in opinion. An appeal having been taken to the House of Lords, it being probable that the corporation would take the property, and pull down the building pending the appeal, the appellant applied to the lords justices for an injunction to restrain the corporation from proceeding till the appeal could be heard. Although the lords justices expressed themselves as being as willing as they ought to be to grant the injunction, it was denied on the ground that their jurisdiction was gone on the dismissal of the bill. Lord Justice TURNER said: "I can not but think that by reason of the dismissal of the bill, the power of the court is gone. I think that the plaintiff, if he intended to appeal to the House of Lords, ought, at the hearing, to have asked the court so to frame its order as to keep alive its jurisdiction pending the appeal."

In *Coleman v. Hudson River Bridge Company*, the judges of the circuit court not agreeing, certified a division of opinion to the Supreme Court. The justices of the Supreme Court were also equally divided in opinion on the questions certified. The consequence was a dismissal of the certificate of division by the Supreme Court. In the opinion dismissing the certificate, the court suggest that the bill must be dismissed, and that the complainant could then appeal from the decree dismissing the bill. The defendant filed the mandate and moved to dismiss the bill; whereupon the complainant's counsel asked the court to so modify the decree of dis-

nissal as to retain the provisional injunction until the decision of the Supreme Court on appeal from the decree of dismissal. It was argued that the injunction did not necessarily fall with a dismissal of the bill; or, if it did, *prima facie*, that it was in the power of the court to continue the injunction till the decision of the appeal. Mr. Justice NELSON, in delivering the opinion of the court, says: "The court can not agree with either of these positions. The legal result of the division of opinion of the judges is a dismissal of the bill, without any qualification. Indeed, the condition of the court renders any qualification or modification of the dismissal impracticable. The case is out of court, so far as it respects any proceedings, except an appeal to review the decree. The judges are disabled, from a contrariety of opinion, to annex any condition, and it certainly requires no argument to show that in case of an unqualified dismissal of a bill, all incidents fall with it. We agree that the chancellor may, in his discretion, direct a modified dismissal, and thereby annex to it such conditions as may seem to him just and equitable. Having the possession and entire control of the cause, this qualified exercise of power is practicable. But such a case is very different from this one, where the dismissal is the result of law, and absolute; and where from the condition of the court no modification can be annexed. It was insisted that an appeal, when taken within the time and in the mode prescribed by the acts of Congress of September 24, 1789 (1 U. S. Stat. at Large, 85, Sec. 23), and March 3, 1803 (2 Id. 244, Sec. 2), will operate under and by virtue of those acts to continue the injunction. But it is quite clear that these provisions deal only with the writ of execution founded upon the decree rendered, and which is awarded by it, and have no application to the provisional writ of injunction, or other incidental proceedings in the progress of the cause." 5 Blatchf. 58.

This case is clearly an authority directly upon the point that when a bill is dismissed without qualification, it is out of court; that all incidents go with it, and the jurisdiction is gone. The very object of the motion was to obtain a modification of the dismissal so as to avoid this result. Mr. Justice Nelson also observes that the point was a subject of consideration in the Supreme Court, and that no doubt was enter-

tained of it by any of the judges. It may, therefore, be regarded as the decision of the Supreme Court, and as settling the question. The conclusion is so obvious that the counsel in the last case, in their motion, proceeded upon the theory that unless they could procure a modified decree to preserve the jurisdiction, the jurisdiction would be gone. The two cases cited are the only ones brought to our notice, or that we have been able to find, directly deciding the point. Occasions for continuing injunctions pending an appeal must have been frequent and pressing; and the fact that no instance can be found in practice of their continuance where the bill has been dismissed absolutely, is the best evidence that court and bar have regarded the jurisdiction as gone.

Counsel for the Richmond company relied upon two cases, *Goddard v. Ordway*, 4 Otto, 672, and *Hart v. The Mayor of Albany*, 3 Paige, 381, neither of which touches the point in this case. In the former case, there was a receiver; and at the time the supersedeas was perfected, the receiver had twenty-five thousand dollars of the fund in his hands, which required an order of the court to enable him to pay it over to the defendant in pursuance of the decree, which order the court was asked to make. The Supreme Court say: "Such an order would be in aid of the execution of the decree, which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it can not place the money beyond the control of any decree that may be made here, for that would defeat its jurisdiction." There the fund was in court, in its custody and control. But in this case, there is nothing to stay, except the collection of the costs. The court has no custody of the subject-matter. There is no fund in court, or under its control. In the case cited from Paige, the master out of court, upon an *ex parte* application, had granted a preliminary injunction restraining the defendant from destroying and removing his building. Upon the coming in of the answer, the defendant moved, on bill and answer, to dissolve the preliminary injunction, which motion was granted. An appeal was taken from the order dissolving the injunction. There was no dismissal of the bill, no final

decree in the case. The appeal was from the interlocutory order. The case still remained in court, and the chancellor had full authority to make any other order that the exigencies of the case demanded. In this condition of things, upon application, and upon terms, he made a new order restraining for a brief time the destruction of the property in controversy. He did not continue the former injunction, but, as he says in terms, exercised a new and original jurisdiction in making the new order; that is not this case. Here the bill is dismissed absolutely, and the case is wholly out of court. There is no suit pending in which any order can be made. It follows that the motion in the suit in equity must be denied.

In the action at law, this court never had jurisdiction to issue an injunction. And it was for this reason that the bill in equity was filed. The court never had the custody of the subject-matter. The supersedeas undoubtedly stays the issue of a writ of restitution and execution for costs. But none has been issued or asked for. The Eureka company are doing nothing whatever by authority, or under, or in pursuance of, the judgment, or of any process issued thereon. It is doing nothing more than it was doing before these actions were commenced, except that it has extended its drifts further into the mine, so as to work the body of the ore which it was seeking by these same means to obtain, prior to the institution of any of these suits. It is simply doing what it was restrained from doing by the injunction issued on the cross-bill while it was in force. It is proceeding under the same claim and authority now, as it was before, nothing more, nothing less. The court has made no order in this case other than to enter judgment for the possession and costs in favor of the Eureka company, and it can make none.

Undoubtedly, if the court had inadvertently, or otherwise, issued an execution after the perfection of the supersedeas, and the plaintiff had been thus wrongfully put in possession, or was about to be so put in possession under the writ, it could, by virtue of its control over its process, have stayed the execution of the writ, or have restored the possession improperly given, had the writ been executed. But nothing of the kind has occurred. Nothing in the custody or control of the court in this action is in any manner affected by the acts of

the Eureka company, and the court is without power to interfere. If there is any power to issue the restraining order asked, it lies with the appellate court. Whether that tribunal can make the order, must be determined by itself. Under its rules, however, upon a proper showing, it can afford a speedy remedy by advancing the cause and bringing it to an early hearing. If deemed a proper case, this would perhaps be the better remedy. While on the one hand the working of the mine might consume the subject-matter of litigation, and leave little for the Richmond company in case of ultimate success, on the other, to restrain the working of the mine adjudged to belong to the Eureka company for the period of three years, the time suggested as likely to be required for the disposition of the case, would be scarcely less calamitous should the decision be affirmed. To those familiar with the subject, it requires no argument to show that it would be extremely disastrous to allow an open mine, with all its vast extent of shafts, drifts, winzes, etc., to fill with water, fall in and become destroyed, and its machinery, hoisting works, mill and mine itself, to be disused for so long a period. Section 1182 of the statutes of Nevada, also, relied on by the Richmond company, relates to proceedings in a case pending, over which the court still has control. But this case is ended and gone beyond the reach of this court. The statutory provision, therefore, has no application.

It follows that the motions must be denied, and the order issued restraining the Eureka company from working pending the motion, vacated and dissolved, and it is so ordered.

1. Courts of New York have no jurisdiction of a suit between foreign corporations concerning lands in another State: *Cumberland C. & I. Co. v. Hoffman S. C. Co.*, 30 Barb. 159.

2. Decree against persons upon whom only constructive service by publication is had, will not affect their mining property beyond the jurisdiction of the court: *Harris v. Pullman*, 84 Ill. 20; 25 A. R. 416.

3. Justices of the peace have no jurisdiction to try a cause for alleged injury arising from a diversion of water: *Hill v. Newman*, 4 M. R. 513. Nor for damages for injury to a mining claim: *Van Etten v. Jilson*, 6 Cal. 19.

4. A suit brought in a court of the State of Nevada by a citizen of California against a citizen of England may be removed into the Circuit Court of the United States under the act of March 3, 1875: *Eureka Cons. M. Co. v. Richmond M. Co.*, 6 Sawyer, 471.

5. Removal of suit supporting adverse claim from State court: *Frank Co. v. Larimer Co.*, 1 M. R. 130; *Chambers v. Harrington*, 111 U. S. 350.

6. Not sufficient to aver generally that the suit involves the construction of an act of Congress concerning mines: *Holland v. Ryan*, 17 Fed. 1.

7. Jurisdiction of circuit court after removal of cause to grant leave to file record before day appointed by statute, and to grant provisional relief: *Mahoney M. Co. v. Bennett*, 4 Saw. 289.

8. Jurisdiction of suits between citizens of different States: *Meadow Valley M. Co. v. Dodds*, 7 Nev. 143.

9. Jurisdiction of court of equity in cases of disputed possession between tenants in common of real estate: *North Penna. Coal Co. v. Snowden*, 42 Pa. St. 488; *Post* TENANT IN COMMON.

10. A mining corporation created by the legislature of Pennsylvania, but doing business in California, can not be sued in the U. S. courts as a citizen of California: *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553.

11. A mining corporation organized in California, but working mines in Nevada, with agents there upon whom process can be served, is a person found in the district within the meaning of the Judiciary Act of 1789: *Thornburgh v. Savage M. Co.*, 7 M. R. 667.

12. A bill for an account of the products of an oil well should be brought in the county where the well is situate: *Thompson v. Noble*, 3 Pittsburgh, 201; *Post* OIL.

FLEESON V. THE SAVAGE SILVER MINING CO.

(3 Nevada, 157. Supreme Court, 1867.)

Stockholder at date of suit disqualified as juror. A person who is a stockholder in a mining corporation at the time a suit is commenced against it, is, under the statutes of Nevada, liable for his proportion of the costs incurred by the corporation in such suit, and is therefore disqualified to act as a juror, although his connection with the corporation was severed before the trial.

Error in overruling challenge for cause, cured. If a court refuses to allow a challenge for cause against a juror who is disqualified, and the same juror is afterward peremptorily challenged, and there is no objection to the twelve jurors who find the verdict, the error of the court in overruling the challenge for cause is cured by the peremptory challenge.

The fact that a peremptory challenge is used to set aside a juror who should have been set aside for cause, will not authorize a reversal, unless it is made to appear that the peremptory challenge was needed to excuse an objectionable juror.

The court will not presume without an affirmative record that a party exhausted his challenges.

Assignment of errors not a statement of facts. An assignment of errors can not be received by an appellate court as a statement of facts in favor of the party making such assignment.

Imperfect record—Presumption as to disqualified juror. In a case in which G., a disqualified juror, was challenged for cause, and the challenge overruled, if the record does not show whether he served as a juror or not, and there is no assignment of error on the ground that he did so serve, but only that appellant was compelled to challenge him peremptorily, it will be assumed by the Supreme Court that he was peremptorily challenged.

Appeal from the District Court of the First Judicial District; Hon. C. BURBANK presiding.

On the trial of this cause, John Gillig was called as a juror. It appeared by his examination, touching his qualifications for a juror, that after this suit was commenced against the defendant he became a stockholder in that corporation, and so continued to be for some time, during which the suit was pending, but had sold out all his stock in the company previous to being called as a juror. It also appeared that, during the pendency of this suit, he had made a contract with a stockholder of the company to purchase from him ten feet or ten shares of stock in the company.

Before this stock was actually transferred to him, he assigned the contract to another party, and at the time of his examination touching his qualification as a juror, he neither held any stock in the company nor had any contract for the purchase of stock therein.

J. NEELY JOHNSON and ROBERT M. CLARKE, for appellant.

C. J. HILLYER, for respondent.

By the Court, LEWIS, J.

But one error is relied on by the appellant in this case as a ground for the reversal of the judgment, namely, that the court erred in overruling the challenge interposed to the juror John Gillig.

That jurors, to be competent, should stand indifferent, and should occupy no position nor stand in any relation which, in contemplation of law, renders them incapable of being impartial, there can be no question. They must be superior to every just objection, or in the language of Lord Coke, they should "be indifferent as they stand unsworn." When entering the jury box they should be free from all feelings of interest, in the result of the action, from all prejudice against or favor toward either of the parties, with no opinion or conviction which would constitute the slightest obstacle to a fair consideration of the evidence, or a candid conclusion upon it.

We are satisfied beyond all doubt that the juror Gillig had an interest adverse to the plaintiff in this action, and was not, therefore, a competent juror. The disqualifying interest, did not, however, as claimed by counsel for appellant, result from the contract to purchase a certain amount of the defendant's stock, and which had been assigned by him at the time of the trial, but from the fact that he was a stockholder in the Savage Company at the time this suit was commenced and for some time afterward, and thereby, under the laws then existing, became liable for his proportion of the costs incurred during such time. By section 16 of an act entitled "An act to provide for the formation of

corporations for certain purposes," approved December 20, A. D. 1862, it is declared that each stockholder should be individually and personally liable for his proportion of all the debts and liabilities of the company, contracted or incurred during the time that he was a stockholder. This law, except the twenty-sixth section, which was annulled and made void by Congress, remained in force until it was repealed by the legislature of the State on the tenth day of March, A. D. 1865. This action having been instituted whilst that law was in force, and whilst the juror was the owner of a certain amount of stock in the company, his liability for a proportion of the costs incurred in it became established. His interest in the result is therefore clear, beyond all question; for if the plaintiff succeeded in obtaining judgment against the defendant, he, the juror, would thereby become liable to pay a proportion of the costs incurred during the time he was a member of the company; whilst, on the other hand, if the plaintiff failed, no such liability would exist. Hence, he was evidently disqualified under the fifth subdivision of section 162 of the Civil Practice Act; and had he tried the cause we would have no hesitation in reversing the judgment for that reason. It is, however, admitted by counsel that he did not, but was peremptorily challenged by the appellant after the court refused to allow his challenge for cause; and there is nothing in the record to show, nor indeed does it seem to be claimed in argument, that there was any objection to either of the twelve jurors who found the verdict. Such being the case, it is left to be determined whether the error committed by the court below, in overruling the plaintiff's challenge for cause, was blotted out or cured by the subsequent peremptory challenge, or whether its effect was to prejudice or injure him, notwithstanding the juror did not try the cause. Upon this point we conclude that the peremptory challenge deprived the error, committed in overruling that challenge for cause, of all its force or effect as a ground for reversal of the judgment of the court below.

Judgments otherwise regular and proper should not be set aside or disturbed for trivial or immaterial errors committed upon the trial. To justify a reversal by an appellate court, the error should be of such character that its natural

and probable effect would be to change or modify the final result. If it is clear, from the record, that no injury resulted from the error, the judgment should not be reversed, for the appellate court does not set aside the judgment of an inferior tribunal because of the mere error, but for the injury resulting from such error. True, it is not always necessary for the party complaining to show directly that he suffered injury, because injury is usually presumed to be the result of material error. It is, nevertheless, the injury directly shown, or presumed, which is in fact the inducement to the reversal of the judgment. Hence the rule observed by all appellate courts, that only such errors as probably affected the verdict, or substantial rights of the parties, will warrant the granting of a new trial.

The ultimate object of all civil actions is to secure some legal or equitable right. The rules governing the impaneling of juries, the introduction of evidence, and the general conduct of trials, are but the means by which such right is to be obtained. Unquestionably, those rules should be closely followed; but if it appear that a departure from them did not defeat or affect the ultimate object of the trial, it would be a mockery of justice to set aside a judgment otherwise proper and regular because of such departure. If the error complained of here was of a character likely to have affected the final result, the judgment should be reversed; otherwise it should be affirmed. If Gillig had acted as a juror, the injury to the appellant would be immediate, as it would deprive him of an impartial trial and force upon him an incompetent juror by refusing to sustain the challenge interposed by him. The presumption of injury in such case would be conclusive, because the juror, being rendered incompetent by law to sit in the case on account of interest in the result, the conclusion would be that he was influenced by such interest in finding the verdict. In that way the error of the court in overruling the challenge would reach and affect the final result; but as the juror was peremptorily challenged and did not try the cause, how was the appellant injured by the error complained of? Counsel say, by being compelled to use one of his peremptory challenges to set aside a juror who should have been set aside for cause. That, however, could not possibly result

injuriously to the appellant unless he had exhausted all his peremptory challenges, and there was some objectionable person on the jury who could not be set aside for cause. If it were shown to this court that the appellant was improperly deprived of a peremptory challenge under such circumstances, where he may possibly have needed it, perhaps it might be treated as sufficient to authorize a reversal of the judgment. The law gives to each party in a civil action four peremptory challenges. If but one be used, though that be upon a juror who should have been set aside for cause, how can it result in prejudice? The party in such case would have three challenges left, which he could use if any of the jurors were objectionable to him. The fact of his not choosing to use them creates a strong presumption that he was fully satisfied with the jury—that it was unobjectionable to him.

To obtain an impartial jury is the sole object of the law giving the right of challenge. Therefore, when such a jury is obtained, there can be no just grounds of complaint. By his own act in not setting aside any of the jurors when he had the power to do so, it is rendered clear that he had a jury satisfactory to himself. It is claimed by appellant that the record shows that his peremptory challenges were all exhausted. But we find nothing of the kind in the transcript presented to us. The only reference to or mention of such a fact is found in appellant's assignment of errors. He says: "The court erred in refusing plaintiff's challenge to the juror John Gillig for cause, and compelling him to exclude said juror by peremptory challenge, thereby forcing him to exhaust his peremptory challenges, and thus disabling him from excluding other jurors to whom he objected."

It is a proposition too clear for argument, that an assignment of errors can not be received by an appellate court as a statement of facts in favor of the party making such assignment. The party wishing to move for a new trial, or to take an appeal, may assign his errors in any form he pleases, and assume any position he may wish, but to make them available they must be sustained by a statement of the facts in the case.

The court in settling, or counsel in agreeing upon a statement, does not pretend to pass upon the correctness of the

assignment of errors, nor indeed has either of them a right to interfere with them. The assertion in the assignment referred to can not therefore be received or treated as a fact in the case. The admission of counsel that the juror Gillig was set aside, is the only evidence which we have that the appellant used any of his peremptory challenges. As the law gives four peremptory challenges, and only one is shown to have been used by appellant, we must presume that he had three remaining which he did not use. It can not certainly be presumed that they were all exhausted when the record shows but one of them used. Hence, we must treat the case as if the record showed affirmatively that but one peremptory challenge was used by the appellant.

But as we have endeavored to show the employment of one such challenge, though to set aside a juror who should have been rejected for cause, will not justify the reversal of the judgment below. The view which we take of this question is fully sustained by the cases of *Freeman v. The People*, 4 Denio, 9, and *Ferriday v. Selser*, 4 How. (Miss.) 518. In the first of these cases, the Supreme Court say: "Upon this point the prisoner had the power and right to use his peremptory challenges as he pleased, and the court can not judicially know for what cause or with what design he resorted to them. He was free to use or not to use them as he thought proper, but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude those jurors, and thus voluntarily, and as I think effectually, blotted out all such errors, if any, as had previously occurred in regard to them."

In the last case, the same question is disposed of in the following manner:

"It appears from the record, however, that when the juror was decided to be competent, Ferriday set him aside by peremptory challenge. He did not, therefore, try the cause, and there is no exception to any of the twelve jurors who found the verdict. We are therefore inclined to the opinion that as the error complained of is not shown to have prejudiced the

right of Ferriday in any way, that it is not a good reason for reversing the judgment. It is a general rule that an appellate court will not set aside a judgment otherwise regular and proper on account of a mistaken opinion of the inferior court, which is not shown to have influenced the final result."

So it seems to be held in Tennessee: *McGowan v. The State*, 9 Yerg. 184.

It was not shown by the record in any of these cases whether the appellant had exhausted his peremptory challenges or not. They therefore clearly sustain the proposition that no injury will be presumed from the error complained of here, unless indeed it be shown by the appellant that his peremptory challenges were all exhausted. In such case, there being a possibility of injury, the judgment might be reversed.

But in this case, as we have shown, the presumption from the record is that the appellant used but one of the challenges, and that he had three remaining unused.

There could, therefore, be no prejudicial results from the error complained of, and the judgment must be affirmed.

JOHNSON, J., having been counsel in this case, did not participate in this decision.

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, C. J.

The first proposition of counsel upon petition for rehearing is, that this court erred in holding that nothing contained in the assignment of errors could be treated as a statement of fact admitted to be correct by the other side. Upon a careful re-examination of the case we still think we were right. On page ten of the record we first find the title of the court in which the action was pending; then the title of the case, and then follows this language:

"Plaintiff's statement and bill of exceptions to be used in said court on a motion for a new trial of said cause, and in the Snpreme Court should said motion be denied.

"Plaintiff moved for a new trial on the following grounds, to wit:

"1. Insufficiency of the evidence to justify the verdict; and to sustain this, he refers to the statement of the evidence hereto annexed, marked Exhibit A."

"2. Errors in law occurring at the trial and excepted to at the time by the plaintiff, to wit:

"I. The court erred in refusing plaintiff's challenge to the juror John Gillig for cause, and compelling plaintiff to exclude said juror by peremptory challenge, and thus disabling him from excluding other jurors to whom he objected. And to sustain this he refers to Exhibit A, pp. 2 $\frac{1}{2}$, 2 $\frac{1}{2}$, 2 $\frac{1}{2}$ and 3."

A number of other alleged errors of law are stated, and finally, on page eleven of the record, this paper seems to end in this way:

"For the purposes of this motion plaintiff will refer to the documentary evidence on file and not included in Exhibit A, as well as the minutes of the court.

"J. S. PITZER, and

"REARDON & HEREFORD,

"Plaintiff's Attorneys."

On page twelve we have again the entitling of the court, the cause, the names of attorneys, etc., followed by this language:

"In the impaneling of a jury, M. M. Mitchell sworn to answer questions." Then follow the questions to and answers of Mitchell. Then the questions and answers of other jurors, the rulings of the court, the testimony of the witnesses in the cause, etc. Finally the statement winds up as follows:

"Case closed and submitted to the jury, who retired, and returned into court, and delivered a verdict in favor of defendant. The jury being then polled at the request of plaintiff's attorneys, eleven of the jurors concurred in the verdict; one only disagreed to it.

"The foregoing statement is agreed to as correct.

"November 27th, 1865.

"PITZER & KEYSER, and

"REARDON & HEREFORD,

"Attorneys for Plaintiff.

"CRITTENDEN & SUNDERLAND,

"Attorneys for Defendant."

The question is: When counsel for defendant agreed to the foregoing statement, what did they admit? With regard to the testimony, the answers of jurors to questions touching their competency, and the rulings of the court, it was no doubt intended to admit that these were correctly stated in the foregoing statement. It was also undoubtedly intended to admit that counsel for plaintiff had filed a paper such as appears on pages ten and eleven of the transcript. But surely it can not be contended that defendant's counsel intended to admit, or did admit, that all the propositions contained in that assignment were true. The defeated party in any cause may file an assignment of error, containing anything he may choose to insert therein. He may assign a hundred errors having no foundation in fact and no connection with the case. The opposing counsel, in settling the statement, could not deny the filing of such an assignment of errors. As we understand the admission of defendant's counsel, it is simply that plaintiff had filed an assignment of errors such as is set forth on pages ten and eleven of this transcript.

That plaintiff's counsel did not consider this assignment of errors as stating the facts of the case, is shown on the face of that assignment. The first error of law assigned reads thus:

"1. The court erred in refusing plaintiff's challenge to the juror John Gillig for cause, and compelling plaintiff to exclude said juror by peremptory challenge, thereby forcing the plaintiff to exhaust his peremptory challenges, and thus disabling him from excluding other jurors to whom he objected; and, to sustain this, he refers to Exhibit A, pages 2 $\frac{1}{2}$, 2 $\frac{1}{2}$, 2 $\frac{3}{4}$ and 3." If the assignment of errors was also to stand as a statement of the facts to support the error, why refer to certain pages in Exhibit A to sustain the assignment? Undoubtedly the counsel understood the assignment as the court does; merely as a statement of the point of argument to be used, with reference to another paper, for the facts to sustain the point. If not, why refer to Exhibit A to sustain the exception?

In the transcript we find nothing which is called Exhibit A; but we suppose reference is made to the statement beginning on page twelve. That statement simply shows that John

Gillig was questioned touching his qualifications as a juror; that, after the examination, plaintiff interposed a challenge for cause, which challenge was overruled by the court. Here the statement closes, without showing what after action was taken. After a challenge for cause is overruled, one of two things usually happens; the challenging party interposes a peremptory challenge, or else the juror is sworn, and sits in the case. A statement, or motion for new trial, or an appeal, should certainly show which of these events actually happens.

Causes are reversed, not because judges at *nisi prius* entertain wrong opinions upon some point of law arising in the progress of the trial, but because they give some practical effect to such erroneous opinions. A bill of exceptions or statement should not stop with merely showing that the judge expressed an opinion which was erroneous; it should show that some wrong step was taken in the progress of the trial. If a judge expresses an erroneous opinion about some material point in his charge to the jury, that opinion is error, because the jury are supposed to be influenced by the erroneous views of the court. But if a court rules that a certain kind of testimony is admissible, when in fact it is not admissible, this ruling, unless it be taken advantage of by the opposite side, does no harm, and is not such error as will reverse a judgment. Hence, in such case, a bill of exceptions should not merely state what was the ruling of the court, but should also state distinctly that the illegal testimony was introduced under the ruling. So, if a juror is challenged for cause, and the challenge is not allowed, the statement or bill of exceptions should show distinctly what disposition was made of the juror. If that is not shown, we do not see how this court is to determine that error was committed. The mere opinion of the judge does no hurt to either side. It is his action founded on that opinion which is erroneous. If this court is not apprised of what that action was, how can it review the case? In this case, the statement only shows what was the opinion of the court; it does not show what resulted from that opinion—what subsequent action was taken.

If the opinion could only have produced one result, then, indeed, the statement need only have shown what the judge decided, because this court would have understood what nec-

essarily followed. But if an opinion of a certain character may have been followed by several courses of action, some of which would have resulted in injury to the party excepting, and others been perfectly harmless, we can not say whether any injury was done to the complaining party. The affirmative is on the appellant, and, failing to show error, the judgment of the court below must be affirmed.

In our former opinion, we say it is admitted by counsel that Gillig did not sit in the case; and petitioner claims that this admission should not bind appellant, because it was made simply on the facts presented by the statement as understood by appellant's counsel; that if the assignment of error is not to be considered as containing facts on which the court can act, neither should the counsel for appellant be bound by the facts therein stated which militate against his client.

This position is perfectly correct. But leaving this admission out of the case, appellant is in no better condition.

In the first place, there is no assignment of error on the ground that Gillig did serve as a juror; and if the appellant were allowed to file such an assignment in this court for the first time, then the record would show two assignments directly contradictory the one of the other. First. That appellant was compelled to exhaust one of his peremptory challenges to get Gillig off the jury. Second. That he (Gillig) served on the jury. No possible state of facts could support both these points. Yet both points might have been made in the assignment of errors in the court below, and no judge, in settling the statement, could with propriety have stricken either out. The assignment of errors is in the discretion of the appellant. This court must judge whether the facts stated in the record sustain the assignments. In this case, there being no assignment of error on the ground that Gillig served as a juror, but only that appellant was compelled to challenge him peremptorily, we did assume that the record showed a peremptory challenge. We did this upon the ground that if he had served as a juror it would have been a much stronger point for appellant. When, therefore, the appellant only complained of being compelled to challenge, we assumed that the juror had not served in the case. If he

had served, it is not likely the appellant would have failed to complain of it.

Only two results could reasonably have followed the ruling of the court on the challenge for cause: the one, that Gillig served as a juror; the other, that he was peremptorily challenged by appellant. If he served, it was clearly error. If the compelling appellant to challenge peremptorily was error, then certainly the case should be reversed, because error, injurious to appellant, was the necessary result of the ruling, and it would be unnecessary to determine whether this injury resulted from the juror serving or from the challenge.

But as, in our opinion, one of these results would have been error and the other not, it becomes necessary for us to determine, if we can, which result did follow the ruling; or, if we can not determine that, then to settle what the rule should be in a case thus left uncertain. As we before said, the appellant must make out his case, and if he only established the fact that something was done which might or might not have produced a result injurious to himself, he has failed.

So, too, all reasonable presumptions are to be indulged in favor of the regularity of proceedings in the court below. This last rule has not much force in this case, because it is conceded the judge below did err in his rulings; but still, as the chances were even as to whether that error of judgment was followed by action injurious to appellant, or that which was perfectly harmless, even in such case the rule is perhaps not altogether inapplicable.

As there was an assignment of error on the ground that appellant was compelled to exhaust his peremptory challenges on Gillig, and none on the ground that Gillig served as a juror, certainly the presumption is that he was challenged. Whether this exhausted his peremptory challenges, or whether he still had one, two or three at his disposal, did not appear of record. The question then arose, whether this was sufficient to reverse the case. This question was one of very great doubt with the writer of this opinion. Upon an examination of authorities, we find a most decided preponderance in favor of the views we took in the case. The Virginia cases seem to hold that the simple fact of compelling a party to challenge a juror peremptorily when he should have

been set aside for cause, would be good ground for granting a new trial.

These decisions were in criminal cases. Possibly the rule might be different in that State in civil cases. There is also a dictum in 3 Gill. 368, to the same effect. This was also in a criminal case. On the other side, we find the several cases referred to in the original opinion. As the record fails to affirmatively show that appellant did exhaust his challenges, we think the original opinion must stand as the law of the case. In this case probably, the appellant, on a more full and complete statement, would have been entitled to a new trial.

We always regret being compelled to decide a case on a mere technicality not affecting the merits, but we can not go outside of the record.

A rehearing is denied.

JOHNSON, J., did not participate in this decision.

1. Verdict set aside on account of jury being treated by successful party. *Sacramento Co. v. Showers*, 6 Nev. 291. See *Schissler v. Chesshire*, 5 M. R. 309.

2. Challenge to juror on account of opinion as to certain vein formations: *Weill v. Lucerne Co.*, 3 M. R. 372.

3. Rejection of juror on court's own motion: *Atlas Co. v. Johnston*, 1 M. R. 388.

4. It is objectionable to allow a law text book to be read by counsel to a jury: *Gelberson v. Miller M. Co.*, 5 W. C. R. 503; the same as to scientific works: 6 M. R. 21, note 10.

BIRMINGHAM CANAL CO. V. LLOYD.

(18 Vesey, Jr., 515. High Court of Chancery, 1812.)

¹ **Injunction refused on account of laches.** Injunction being sought against the draining of a coal mine preparatory to working the same on account of alleged injury to a canal, it was *refused* on account of the *laches* of plaintiffs for two years, permitting expenditure.

The plaintiffs being authorized by an act of Parliament 21 Geo. III, to make reservoirs to supply the canal with water, had applied to that purpose some pieces of water, called Broadwater, arising from the subterraneous communication of water in some exhausted coal mines. The defendants, who were proprietors of neighboring coal mines, in consequence of a previous promise to the plaintiffs, gave them notice in April 1810, of the intention of the defendants to open an old sough or level made for the purpose of draining the exhausted mines and at the expiration of six months to draw off the water preparatory to working their mines. A counter notice was given by the plaintiffs that they would sue the defendants at law for damages if they should proceed. The defendants having proceeded before they commenced to work their collieries, the bill was filed, praying an injunction against opening or proceeding with any sough, drain or channel, connected or communicating with the said pools or pieces of water, or in any other manner draining any of the water from the said pool or reservoir of Broadwater by means whereof the said canal or navigation may be injured.

SIR SAMUEL ROMILLY and Mr. BENYON, for the plaintiffs, moved for an injunction upon affidavits, stating an expenditure by defendants of £2,000 in erecting fire engines, etc.

Mr. HART and Mr. J. MARTIN, for the defendants.

The Lord Chancellor (ELDON).

Assuming, for the present purpose, this piece of water called Broadwater to be a reservoir within this act of Par-

¹ *Real del Monte Co. v. Pond Co.*, 7 M. R. 452; *King's Lynn v. Pembrton*, 1 Swanst. 252.

liament, the plaintiffs must establish their right to damages at law, before I ought to grant this injunction. I proceed here upon the circumstances of delay. The defendants having, in pursuance of their promise to give six months' notice of beginning to work their mines, given notice in April, 1810, expressly mentioning their purpose to open the sough, the company having given a counter notice that they would in that case seek damages at law, and having a right to apply promptly to this court to prevent the act, instead of taking that course permit the defendants to expend £2,000 in proceeding toward getting coal, by erecting fire engines, etc., and when they are about to get the coal, the plaintiffs come for an injunction. They ought to have commenced their opposition when they could have done so with justice; and though this is not the case (*Anon. Amb. 209*) before Lord Hardwicke, of stopping a colliery actually working, yet the act of stopping or draining a colliery about to be wrought, may possibly, with reference to rival ownerships, be the means of making it absolutely unproductive twelve months hence, when it is to be wrought, instead of at the present time.

I have seen the injunction granted in Lord Byron's case (*Robinson v. Lord Byron*, 1 Bro. C. C. 588) by Lord Thurlow, who, though the plaintiff applied immediately, put him to go forthwith to trial.

These plaintiffs, therefore, not having applied until nearly two years after the notice was received, must take their chance at law; and this court ought not to interfere by granting an injunction.

PRENDERGAST V. TURTON.

(1 Younge & Collyer, Ch. 98. High Court of Chancery, 1841.)

Special risk—Special vigilance. Mineral property, of all properties perhaps the most requires the parties interested in it, to be vigilant and active in asserting their rights.

¹ Facts of the case—Delay by forfeited shareholders. The plaintiffs, shareholders in the "United Hills Mining Company," had paid all calls on their shares, when, in 1826, a new assessment was laid, against their protest. In 1828 their shares were declared forfeited. The concern was then worked at a loss till 1835, when it began to make a profit. In

¹ *Leaming v. Wise*, 7 M. R. 41.

1838 they filed their bill. *Held*, that the rights of plaintiffs were barred by laches, and their failure to show good cause for the delay, although the improper nature of the forfeiture was conceded as well as many other acts of misconduct by the directors during the interval.

By an indenture dated the 8th day of February, 1825, and made between Richard Penrose of the first part, Sir Thomas Turton, Bart., Robert Clarke and Charles Carpenter of the second part, and the said Sir Thomas Turton, Robert Clarke and Charles Carpenter, and the several other persons whose names were thereunto subscribed and seals affixed of the third part (being the deed of settlement of the "United Hills Mine Company"), it was covenanted and agreed, that the capital of the company should consist of the sum to be raised by the sale of 200 shares of £50 each, and of such further sum or sums as might be raised by the sale of new shares, under the power for that purpose therein contained, such new shares not to exceed the whole number of shares, including the number of 300; that there should be three directors of the company, each of whom should hold twenty shares, and that Sir Thomas Turton, Robert Clarke, and Charles Carpenter, should be the directors and trustees of the company; that the directors should continue to hold office from the day of the date of the said indenture for the space of seven years then next ensuing, and until the first Friday which should be in the month of June, 1832, and then should go out of office, but might nevertheless be re-elected by the proprietors or directors for the then seven years next ensuing, or for any shorter term. That the directors should have power to renew leases, etc. That the directors for the time being should give one month's notice in each year of a general court of proprietors, to be holden at the office of the company on the first Friday in June in each year, by letter sent to each proprietor. That at such general court a report should be made to the proprietors by the directors of the state of the mine, and an account given of the receipts and expenditure. That as to all questions relating to any business or matter to be transacted at the general meeting, or any special general meeting, a majority of the votes of all qualified proprietors present, not declining to vote, should be sufficient to decide the same, except for altering or rescinding the laws or regulations of the company, *or dissolving the same, as thereafter mentioned.*

That every proprietor should, on paying into the banking-house of the company his first installment, subscribe his name and place of abode in a book of the company, etc., and such signature should entitle the shareholder to be considered from thenceforth as one of the proprietors of and adventurers in the said company, and to the receipt of all the benefit and advantage thereof, in proportion to the shares holden by him or her, so long as he or she should comply with the conditions thereunto annexed, and should pay the several installments on the said shares of £50 each, as the same should be called for by the said directors for the time being. That the directors of the said company should have power to call for installments on the said shares at such times and in such proportions as should be necessary, and, if necessary, should have power to call for the whole installments; and in case the same should, in the judgment of the directors for the time being, be insufficient for carrying on the business of the said mine without further aid, then and in such case the directors should call a meeting of the proprietors, and lay before them a full and particular account of the state of the concerns of the said company, and submit to their decision the propriety of *increasing the number of shares, or of taking such other steps as might appear advisable*. That in case any installment or installments so called for by the directors as aforesaid, should be unpaid for the space of fourteen days after the day fixed for the payment thereof, the share or shares on which such payment was called for and unpaid, and all the installments which should have been previously paid thereon, should be absolutely forfeited for the benefit of the company, and the original holder thereof should cease from such period to have any interest or advantage or concern whatsoever in the said company or mine, in respect of the share or shares so forfeited. That if at any time or times thereafter it should become necessary to increase the said shares of the said mine or company, by the addition of the number of one hundred more shares of £50 each, as before provided, the increased number of such shares should be allotted and divided to and in equal proportions amongst the then proprietors, according and in proportion to their respective shares; and in case any such proprietors should decline to increase his or their shares by

such proportionate addition thereto, the shares declined to be taken by such proprietor or proprietors should be divided equally amongst such remaining proprietors, etc. That the proprietors who were in future to be eligible to fill the offices of directors, should be elected as follows (that is to say), every vacancy occasioned in the office of director by removal, death or resignation, or by any other means except that of going out at the expiration of the period for which they were elected, should be filled up with all convenient speed by the election of a new director at the annual general meeting, or at any special general meeting to be specifically called for that purpose. That the control and management of the funds of the company should be vested in the directors for the time being, and they were thereby authorized and empowered at the general annual meeting of the proprietors, to declare such dividend as in their judgment should be proper to be made amongst the proprietors according to their respective shares.

The deed contained no provision relating to the dissolution of the partnership, notwithstanding the allusion to such provision before mentioned.

The deed was executed by the directors and the other proprietors or shareholders in the undertaking, and, amongst others, by a Mr. Serjeant, who was then the secretary, and who held twenty-five shares. Of these shares he sold four to Miss Mary Kent, and two to her sister, Miss Isabella Kent; and though the shares remained for some time in the name of Serjeant, the Misses Kent were treated by the company as the real owners of those shares. Upon the occasion of Serjeant ceasing to be secretary, their names were entered in the books of the company.

The Misses Kent regularly paid the amount of calls which were made upon them in respect of their shares, to the full extent of £50 per share. Before paying the last installment Mary Kent wrote a letter, dated in September, 1826, to Mr. Hebden, the then secretary of the company, in which, after proposing to pay the tenth installment, due on the shares of herself and sister, she requested to know whether that was likely to be the last call; adding that she was anxious to settle for all that was due without loss of time, as she was on the eve of leaving home. To this answer Mr. Hebden replied in

a letter dated the 27th of September, in which he stated that he had some time previously mentioned to Mr. Wilson (a gentleman who had been in the habit of paying the calls for the Misses Kent), that at a meeting of the shareholders it had been resolved to meet the expenses of the mine by additional calls rather than by an increase in the number of shares, and that a call of £5 a share had been made, which had been paid on the 10th inst. In reply to this letter Mary Kent wrote a letter to Hebden, in which she said that she should make some arrangement for the payment of the additional £5 a share, adding, however, that she was not prepared for this last demand, as she had been led to suppose by the former secretary that no more than half the original sum of £50 would be required.

The resolution to which Mr. Hebden alluded in his letter to Miss Kent, was passed at a meeting which took place on the 27th July, 1826, and was in these terms:

“Resolved, that the mines be prosecuted with as much attention to the diminution of expense as possible; and that calls on each shareholder be in proportion to the number of shares held by each, and at intervals as great as the nature of the work contemplated will admit.”

In November, 1826, Mary Kent married Captain Stephen Prendergast. Soon after the marriage Mrs. Prendergast received a letter from Mr. Hebden in which, on the part of the company, he demanded payment of the additional installment of £5 per share, mentioned in his former letter, and also a further additional installment to the same amount. These additional payments Captain Prendergast and Miss Kent refused to make; and they questioned the right of the company to enforce them.

A long correspondence then ensued between Captain Prendergast and Mr. Hebden, in the course of which the former repeatedly offered to sell his shares to the company at a reduced rate; and by a letter of the 22d February, 1827, he made a specific offer of the shares to the company at £25 per cent. These offers were refused on the ground that the additional calls had not been paid up. An objection was also raised that the shares in question were not legal interests, but held in trust only. Captain Prendergast and Miss Kent then

attempted to sell their shares to third persons, and with this view, tendered to the company, for their approval, a draft assignment of the legal interest. The company, however, declined to do more upon this subject, than to consent to a case being laid before counsel.

During these proceedings, fresh calls were continually made for installments; and on the 6th of June, 1828, a meeting of proprietors was held, at which Captain Prendergast and Miss Kent were reported by the secretary to be considerably in arrear in the payment of their installments, and it was ordered that they should be written to, and apprised that unless the arrears of their shares were paid up in a fortnight, the shares would be forfeited. On the 31st of July, 1828, no letter having been received in answer to the notices sent in pursuance of the foregoing resolution, the shares of Captain Prendergast and Miss Kent were declared forfeited.

The bill was filed on the 5th of September, 1838, by Captain and Mrs. Prendergast, against the then directors, Sir T. Turton, Duncan, Campbell and Clarke, and against Serjeant and Miss Kent, the latter of whom had assigned her interest to the plaintiff. It alleged that in 1828 the working of the mine was entirely suspended; that for some years afterward little or no profit was derived from it; that during the whole of that time the plaintiffs were absent from this country, and in consequence of the state of the concern took no further proceedings in respect of their shares, but that the plaintiffs returned to England at the latter end of 1837, when they applied to have their shares restored to them. The bill prayed that the declaration of forfeiture of the plaintiffs' shares might be declared void, and that the plaintiffs might be let in to participate in the profits of the mine, upon payment of their share of all expenses incurred in working of it; and with reference to certain alterations which had taken place in the constitution of the company, and certain alleged misconduct on the part of the directors, it prayed that the resolutions by which it had been attempted to subdivide the shares, might be declared void against the plaintiffs, and that the business of the company might be decreed to be carried on pursuant to the provisions of the indenture of settlement, and that the directors might be decreed to account for all sums of money

improperly appropriated by them out of the funds of the company.

The defendants, Turton, Campbell and Clarke, by their answer, denied that the working of the mine had, at any time since August, 1828, been entirely, or almost entirely, suspended; but on the contrary, alleged that it had been ever since in full work, though the working of it was attended with considerable loss, till about the year 1835, when it began to yield a profit; and they verily believed that the circumstances of the mine now yielding a considerable profit had induced the plaintiffs to take the present proceedings. They admitted, in answer to a charge in the bill as to that particular, that, at a meeting of shareholders held on the 7th of March, which was attended by the defendants, and of which, of course, no notice was given to the plaintiffs, it was resolved that certain clauses in the deed of settlement should be annulled and that the capital of the company should thenceforth consist of 4,000 scrip shares of £5 each, making a capital of £20,000, and that twenty new scrip shares should be allotted for each old share, and that the shares of the plaintiff and Miss Kent should be sold for the use of the company.

With respect to the charges of misconduct in the directors, the following facts were admitted by the answer: That Carpenter, one of the original directors, died in 1831; that the time for Turton and Clarke continuing in office would, according to the deed of settlement, expire in 1832; that Turton and Clarke, nevertheless, continued the only directors till October, 1834, when Clarke became a bankrupt; and that Turton afterward was sole director till 1835, when Campbell joined him in the direction. Turton, however, in justification of himself, stated that in June, 1832, there were no other shareholders qualified, who would accept the office, and that in June, 1835, he was re-elected. As to Campbell, it was admitted that he, at the suggestion and with the assistance of Turton, qualified himself for the direction by purchasing, at the low price of £50, twenty shares of one Harding, who had been formerly a director of the company, but who had, in 1830, absconded from this country, while indebted to the company in £300; and that several sums were due on these shares for calls in 1829 and 1830, which had never been paid up. It

was also admitted that Turton had charged the company with his salary of £100 a year from 1826 to 1836, during a great part of which period the mine had been unproductive.

It appeared from the admissions that the meetings, in which the proceedings relative to the forfeiture of the plaintiff's shares were discussed, had been in several respects informally held.

There was no satisfactory evidence as to the exact residence of the plaintiffs during the time of their alleged absence from England. It was admitted by the defendants that in 1827 and 1828 they were in Jersey.

Three grounds for defense were set up by the answer: first, want of parties; secondly, multifariousness; thirdly, the Statute of Limitations, and length of time independent of the statute.

Upon the first point, the defendants' counsel contended that all the shareholders, they being all interested in the introduction of the plaintiffs into the concern, should be parties; but at all events, that the persons present at the making of the resolutions sought to be annulled, should be parties. This point, however, there being no necessity for it, was not determined.

Upon the second point, the plaintiffs' counsel referred to *Ward v. Cooke*, 5 Madd. 122, and *Wynns v. Callander*, 1, Russ. 293. As to the third point,

Mr. SIMKINSON and Mr. THOMAS TURNER, for the plaintiffs, said that the Statute of Limitations had nothing to do with the subject; the important part of the defense was that which rested on length of time, independently of the statute. It is a startling proposition to say that parties who have advanced considerable capital, no part of which has been repaid to them, are to have no relief in respect of their advances, merely because of the lapse of a few years. Suppose the concern had been unprosperous and the directors had dissolved partnership, would not the plaintiffs have been entitled to an account and to credit for what they had advanced? Could it be said in answer to such a claim that six or seven years had elapsed since the claim arose? The length of time might and ought to have considerable weight to induce the court to do

justice to the defendants; but it would not altogether bar the plaintiffs, they being *recti in curia* and the statute not applying. In *Lake v. Craddock*, 3 P. W. 158, the partnership had been abandoned by the father of the defendant thirty years before the bill was filed, and it was contended that the four survivors were entitled to the whole concern; but the decision of the master of the rolls was that, though the legal estate survived to the four, Craddock's representative had an equity in one fifth. [The vice-chancellor referred to *Norway v. Rowe*, 19 Ves. 144, and *Senhouse v. Christian*, 1 Term, 560. It does not appear that the facts of this case are stated in the registrar's book. The prayer of the bill will be found in R. L. 1793, B. fo. 712, and the hearing and dismissal of the suit is recorded in R. L. 1794, B. fo. 257.] It is submitted that those cases depend on circumstances differing very strongly from such as occur here, though if this case be considered with reference to them, the principles laid down by Lord Eldon in *Norway v. Rowe*, are perfectly consistent with those on which this case must be decided.

This is not a case in which the plaintiff has his election between law and equity, or in which there being a remedy at law, a court of equity gives extraordinary relief. In cases of that sort, no doubt the utmost promptitude is required of a plaintiff. In this case the remedy is entirely in equity, and the relief to be administered depends on the consideration of fraud. The defendants here can have no advantage from the Statute of Limitations, or from that analogy to the statute on which this court frequently acts; but it is suggested that their ground of defense is the acquiescence of the plaintiffs. But acquiescence as distinguished from the statutory bar of the Statute of Limitations is founded intrinsically on the subject of fraud. The parties against whom the doctrine of acquiescence has been enforced, have either concealed their rights or led the other party to believe their rights have been waived, and so have inveigled that other party into expense, leaving him to expect that he should have the sole benefit. That is a fraud upon parties who lend out their money upon that faith, and those who so act can not afterward come forward under color of enforcing their rights: *East India Company v. Vincent*, 2 Atk. 83; *Hanning v. Ferrers*, Gilb. Eq. Rep. 85;

Arnot v. Biscoe, 2 Ves. Sen. 96. But in the former of these cases, Lord Hardwicke took the distinction as to dealing with another person's property with or without his acquiescence. If the party dealing with the property has notice of the other party's rights and no reason to suppose that he may not pursue them, the doctrine of acquiescence falls to the ground, because there is no fraud. What would Lord Hardwicke have said to a case in which the party was excluded from his own property? The plaintiffs could not enforce their right; it was not practicable. They have done enough to establish their legal rights, and are entitled to a decree with all their costs. The majority, without the plaintiffs' consent, thought proper to call on them for an additional sum; the plaintiffs did not agree. Were they not at liberty so to do? Having entered into a limited engagement, were they to be compelled to go into a larger one? They were not bound to submit to those further calls. Could they get back their capital? Admitting they had a legal right to determine the partnership, how was that to be enforced while the majority chose to go on? They could only dissolve it by a bill to which all the shareholders would be necessary parties. They were compelled, therefore, either to continue paying more than was required by the deed, or to forfeit their shares. Has this result any foundation in the deed or in law or in justice? The plaintiffs thought it unnecessary to repeat useless applications. There was a quiescence for nine years, but no acquiescence for a moment. The plaintiffs offered every reasonable concession; what more could be done? There was no voluntary abandonment—no abandonment of their interests at all; and that distinguishes this case from *Senhouse v. Christian*. In that case, which is reported in a short note, and *Norway v. Rowe*, the parties working the mine had reason to believe from the other parties that they had abandoned their interest. Here all the plaintiffs did was to refuse to go on in the way proposed by the majority, and which was contrary to the settlement; for it can not be contended that such a vague expression as "taking such other steps as shall appear advisable," gave them power to remodel the company. Supposing even they could have proved a case of acquiescence against the plaintiffs, they have not made that case by their answer. They rely on the statute,

and also on length of time—which only means the statute, and length of time by analogy to the statute. Then they allege that if the concern had not turned out profitable, the plaintiffs would not have applied to the court. But to make a case of acquiescence they ought to have alleged that the plaintiffs had given them reason to suppose that in no case should they apply to the court.

Mr. SWANSTON and Mr. LOVAT, for the defendants, were stopped by the court.

The VICE-CHANCELLOR.

As to the objection for want of parties, after carefully attending to the argument of Mr. Swanston, I considered that the best course was to reserve that question till the case had been fully heard on the part of the plaintiffs, or on the part of the plaintiffs and defendants. The case has now been fully heard on the part of the plaintiffs, and, as I think, a case has not been made upon which this court, according to the principles on which it acts, would be justified in giving the plaintiffs relief. I think it would be useless now to enter into the question of parties. To decide in favor of plaintiffs who fail on the merits, would be unnecessary; to decide in favor of the defendants would be to drive the plaintiffs to amend their bill in a case where there was no prospect of relief.

I beg it therefore to be understood, that I give no opinion whatever on the question of parties.

Another point there is, which it is not necessary to decide, and which I wish not in any manner to be considered as deciding. I mean the question whether the course which the directors thought proper to take as to the forfeiture of the shares, was such as ought to have been pursued, and whether their proceedings could not have been set aside, if steps had been taken in time for that purpose. My judgment is entirely consistent with the supposition that all they did was unauthorized, and capable of being impeached successfully, if the plaintiffs had come in due time. The point which has struck me from the beginning (and upon which everything

that could be said has been said by counsel) is the time at which the suit has been instituted, having regard to the peculiar nature of the property, and the circumstances of the case. This is a mineral property, a property, therefore, of a mercantile nature, exposed to hazard, fluctuations, and contingencies of various kinds, requiring a large outlay, and producing, perhaps, a considerable amount of profit in one year, and losing it the next. It requires, and of all properties perhaps the most requires, the parties interested in it to be vigilant and active in asserting their rights. This rule, frequently asserted by Lord Eldon, is consonant with reason and justice. Lord Eldon always acted upon it, and has been followed by subsequent judges of great knowledge, experience and eminence. Now, in the present case, conceding for the sake of argument that the shareholders could not be compelled to contribute beyond £50 a share, and did no wrong in declining to make advances beyond that sum, yet the result of all the circumstances of this case appears to have been, that the mine could not be carried on without further outlay.

The plaintiffs objected to this further outlay, and then a considerable discussion ensued, which was substantially concluded in 1828. Some subsequent letters were written, but they did not, I think, materially vary that state of the case. The residence of the plaintiffs was occasionally in Jersey and occasionally in England; but they never appear to have been absent from the Queen's dominions. In this state of things, the concern not improving, and the plaintiff and Miss Kent refusing to contribute to its necessities beyond the amount already stated, some parties are found who are willing to stem the difficulties and incur the hazard, and from this period, through several years down to 1835, they venture to carry on the concern. In 1836 affairs begin to look better, and the mine, whether legally or illegally, wisely or unwisely, is in that year new modeled, and the shareholders are turned into what are called scripolders. Matters go on in this manner in 1836 and 1837, and it was not till November, 1837, when the result of the struggle had appeared, that, after a profit had been made by the unassisted efforts of those who still adhere to the speculation, the plaintiff and Miss Kent applied for and claimed their shares. Negotiations were then set on

foot, demands and refusals took place in the ordinary way, and it was not till September, 1838, that the bill was filed; but the demand may be taken as made in 1837.

I was anxious, being impressed very much with Mr. Simpson's opening of the case, as it related to the conduct of the directors, to have the time which so elapsed in some way accounted for; to have the chasm between the years 1828 and 1837 in some manner filled up; to have the conduct of the plaintiffs during that time in some measure explained; to have the case placed in a position upon which the court could fasten itself, in order to give the plaintiffs that property which they might have been entitled to, had they presented themselves here in due time. But I am unable to find the means of doing this. Here is a mineral property, the subject of great uncertainty and fluctuation. After its character has been established with much difficulty—after a period of nine years, during which they rendered no assistance to the concern, a claim is brought forward by those who are now willing to share in its prosperity. It appears to me, that although this is a case to be decided in equity only, and at the hearing, and not on any interlocutory motion, it is impossible to say (consistently with my views of what are the principles of this court) that the plaintiffs can be assisted.

The way in which they state their case, as to this part of it, is this: (His Honor then read a passage in the bill, see *ante*, page 172.) The claim, therefore, was not brought forward till November, 1837, and, if there is any allegation, there is no evidence, of there being any recent discovery of their right.

It has been suggested that this has not been put in issue. I think it has, however, in various parts of the answer, in pointed allusions to the value and fluctuation of the property, and the conduct imputed to the plaintiffs in lying by during the existence of the fluctuation and the struggle. I find it, therefore, impossible to give that relief to the plaintiffs which they seek.

His Honor then said, that, unless he heard any argument to the contrary, he should dismiss the bill without costs. No such argument being raised for the defendants, the bill was dismissed without costs accordingly.

Dec. 8th.—His Honor, in the course of the argument in *Tulloch v. Hartley*, (1 Y. & C. 114), adverting to the forego-

ing case, said that though his opinion remained the same, he thought it not an unfit case to be submitted to the Lord Chancellor.

CLEGG V. EDMONDSON.

(8 DeGex, M. & G. 787. High Court of Chancery, 1857.)

Laches of excluded partners. Managing partners in a mining partnership at will gave notice of dissolution to the rest, and intimated their intention after the dissolution to apply for a new lease for their own exclusive benefit. They did so, obtained a new lease, and carried on the colliery to a profit. The excluded partners continually asserted their right to share in the profits, but took no active steps to enforce it for nine years: *Held*, that they were precluded by laches from any relief.

Special risk of mines. The rules as to laches and acquiescence governing cases of direct trust and applying to property of an ordinary character, do not apply to constructive trusts affecting property like mines, subject to extraordinary contingencies and requiring large expenditures without any certainty of returns.

¹ **Faults.** Considered as an inevitable risk of coal mining.

Clamor without contention. The continual assertion of a claim, without any act done to give it effect, will not keep alive a right which would otherwise be precluded.

² **Partner renewing lease for his exclusive benefit.** Although it can not be laid down that in no case can a partner during the partnership contract for a new lease excluding associates, yet it is difficult, and especially for a managing partner, to make out such a case; and the mere intimation to his associates of his intention so to do is not sufficient to exclude their interest, although the partnership is dissoluble at will.

The bill in this cause was filed for the purpose of fixing a trust for the benefit of the plaintiffs upon two leases of mines, dated respectively the 30th March, 1837, and the 11th December, 1846, for relief against the dissolution of a partnership in the working of these mines, which subsisted up to the 30th September, 1846, and against the proceedings adopted by some of the defendants for the dissolution and winding up of that partnership, and for an account of the property of the partnership and of the profits of the mines as well before as since the time when the partnership was alleged to have been dissolved.

¹ 6 M. R. 33.

² *Phillips v. Reeder*, 18 N. J. Eq., 96; *Post* PARTNER.

The circumstances of the case were as follows:

By a lease dated 30th September, 1805, some mines, called the Oliviger Copyhold Mines, were demised by the Duke and Duchess of Buccleugh to several persons for the term of twenty-one years from the 29th September, 1805. By another lease dated the 27th of December, 1810, some other mines called the Oliviger Freehold Mines, were demised by Mr. Towneley to several other persons for the term of twenty-one years, from the 20th November, 1810. By an agreement dated the 13th of February, 1818, John Green (hereinafter distinguished by the description of "John Green of Lamb Row") Roger Green, William Beanland, and Henry Clegg, the then surviving lessees under the lease of 1805, and John Collinge, John Haigh, William Edmondson, and Robert Ormerod, the lessees under the lease of 1810, agreed to become partners in working both the freehold and copyhold mines, and in the capital and stock, machinery and utensils employed therein for the then residue of the term of twenty-one years, granted by the lease of the freehold mines, Collinge, Haigh, Edmondson, and Ormerod each taking one fifth, and the other four partners taking the remaining fifth between them in equal shares. By this agreement it was, amongst other things, agreed between all the parties, that in case any one or more of them should at or previous to the expiration of the term in the freehold mines obtain or procure any fresh or renewed lease of all or any of the mines, seams, and beds of coals or collieries within the said township of Oliviger, such lease and all interest, benefit and advantage to arise or accrue therefrom should belong to and be enjoyed by all and every the parties thereto, their respective executors, administrators and assigns, in such shares and proportions as were thereinbefore expressed. And it was further agreed between all the parties, that no fresh partner or partners should be admitted or received into the copartnership or undertaking without the concurrence in writing of all the existing partners and the executors or administrators of every deceased partner, in case any such there should be (other than and except only the person or persons who might purchase the share or shares of any of the copartners in pursuance of the proviso thereinafter contained, and then only in respect of such share or shares). Provided always, and it was thereby further agreed between all the

parties, that in case one or more of them, their or his executors, administrators, or assigns, should at any time thereafter during the said term of fifteen years, become bankrupt or insolvent, or should propose to sell their or his share or interest in the said mines and collieries and copartnership business or undertaking, then and in such case it should be lawful for the other partner or partners, or any of them, to purchase the share or shares of the party or parties so becoming bankrupt or insolvent, or proposing to sell, of and in the said mines and collieries and copartnership undertaking.

On the 30th of September, 1825, a reversionary lease of the Cliviger Copyhold Mines, for the term of twenty-one years from the 29th of September, 1825, was granted by the Duchess of Buccleugh to Mr. Towneley, and by an agreement dated the 16th of January, 1829, Mr. Towneley agreed to assign this reversionary lease to John Haigh, John Collinge, Henry Clegg, and the executors of William Edmondson, being some of the persons who were then partners in working the mines under the agreement of the 13th of February, 1818.

The agreement of the 16th of January, 1829, contained a stipulation on the part of Mr. Towneley, that if at the end of the lease of the Cliviger Freehold Mines (the lease of the 27th December, 1810), he and the lessees should not agree for the further lease thereof, he would not work the freehold collieries and coal mines nor let the same to any other person or persons for that purpose, until after the expiration of the lease of the 30th September, 1825, but would permit the said collieries and coal mines to remain dormant and unoccupied for the benefit of the said lessees until they should have finished the term in the copyhold mines. By virtue of this agreement to assign, the copyhold mines continued to be worked by the partnership till 1846. The Cliviger Freehold Mines, after the expiration of the lease of 1810, continued to be worked by the partners, the lessor allowing them to hold over. By a lease dated the 30th of March, 1837, being one of the leases of which the plaintiffs claimed the benefit, Mr. Towneley demised the mines under other lands in Cliviger to James Collinge and James Haigh for the term of 21 years from the 30th of March, 1837. James Collinge was not an original partner under the agreement of February, 1818, but had become a partner under the will of his father, who was a party to that

agreement. James Haigh was not, at the date of this lease, interested in the freehold and copyhold mines, but afterward became interested in them. The mines demised by this lease formed a distinct colliery, called the Bankwell colliery, and these mines were worked by the two lessees to whom they were demised down to some time in the year 1841, at which time the two lessees ceased to work them, it being objected by the parties interested under the agreement of the 13th of February, 1818, that the mines were reached by the above mentioned stipulation on the part of Mr. Towneley, contained in the agreement of the 16th of January, 1829. In consequence of this objection these mines were not again worked until the partnership created by the agreement of 13th February, 1818, was assumed to have been dissolved, and the profits which had been derived from working them down to 1841 were brought into the accounts which were made up upon the occasion of that alleged dissolution.

In the year 1846, all the lessees under the leases of the 30th of September, 1805, and the 27th December, 1810, who had been parties to the agreement of the 13th of February, 1818, were dead, except John Haigh. There had been various sales and devolutions of the shares held under that agreement, and a large number of persons had become interested under it. The devolution of interests, so far as it need be stated, was as follows : John Green of Lamb Row, one of the parties to the agreement, and who was entitled under it to one twentieth share, died in the year 1827, having made his will, dated the 30th of June, 1827, and thereby after stating that he had a share in certain collieries at Cliviger, Altham, and other places, he declared that his son John Green of Accrington should have £50 a year from the produce of the said collieries for being the bookkeeper, likewise for the care and management of them, and that whatsoever other property arose or accrued from the said collieries, besides paying him £50 yearly, the overplus money should be equally divided amongst his son John, his daughters Sally, Jane, Alice, and Margaret, to them and their heirs as tenants in common during the term of the lease granted to him; and he appointed John Green of Accrington and several other persons to be his executors. The plaintiff, Jane Clegg, was the daughter Jane mentioned in his will, and thus became interested in the

share of John Green of Lamb Row. John Green of Accrington purchased some small share belonging to another person, and it was alleged by the bill, that he made that purchase with the profits of the share of John Green of Lamb Row. He died in the year 1842, having by his will appointed the defendant James Green and two other defendants named Dewhurst and Claiffer, to be his executors.

Henry Clegg, another of the parties to the agreement of the 13th of February, 1818, and who was entitled under it to another one twentieth share, died in the year 1836, intestate, and the plaintiff, Jane Clegg, was his widow and personal representative, and thus interested in his share, in which the other plaintiffs also claimed to be interested as some of his next of kin.

John Haigh, another of the parties to the agreement, and who was entitled to one fifth share under it, was living in 1846, but afterward died and was represented in the suit by the defendant, James Haigh.

William Edmonson, another of the parties to the agreement, and who was also entitled to one fifth share under it, died in the year 1828, and his share passed to his executors, Bernard Edmonson and John Barrowclough.

John Collinge, also a party to the agreement, and also entitled to one fifth share under it, died in the year 1832, having made his will, dated 4th of May, 1831, whereby he bequeathed to his sons, James Collinge and Giles Collinge, both since deceased, all his leasehold estate and interest in his collieries within the township of Oliviger, to hold to them, their executors, administrators and assigns, as tenants in common, and appointed his sons, John Collinge, James Collinge and Giles Collinge the executors of his will. Giles Collinge, who was entitled to a moiety of the share of the original John Collinge, died in 1836, having by his will appointed his brother, James Collinge, and Felix Leach to be his executors.

The conduct of the partnership business appeared, from a very early period, to have been intrusted to some of the partners as managers, and for some time previous to and in the year 1846 the managing partners were John Haigh, James Collinge, Bernard Edmondson, John Barrowclough and James Green. James Green was placed in the management as rep-

representing the interests (amongst other persons) of the persons who were entitled to the shares of John Green of Lamb Row, and Henry Clegg.

In the year 1846, when the lease of the 30th of September, 1825, which would expire on the 29th of September, 1846, was approaching its termination, the five managing partners above named determined to dissolve the partnership for working the mines, and if they could succeed in doing so, to obtain for themselves a lease of the mines to the exclusion of the other partners. From the evidence in the cause it appeared that this determination on the part of the managing partners had become known to Robert Clegg (who had at that time become interested in Henry Clegg's share and assumed to represent the interest of the other members of the Clegg family), at least as early as the month of June, 1846. He objected to the managing partners obtaining the lease for themselves exclusively, and appeared to have proposed that he should be admitted to the benefit of the lease on behalf of the Clegg family, but that others of the partners should be excluded. This, however, was not acceded to by the managing partners, it being considered that from the termination of the lease of the 27th of December, 1810, the partnership had subsisted as a partnership at will only. The managing partners, in the month of July, 1846, served on the other partners a notice for dissolving the partnership on the 30th of September, 1846:

In the meantime Mr. Towneley had been in treaty with the lessors of the copyhold mines for a renewed lease to him of the copyhold mines, and on the 4th of August, 1846, a renewed lease of the copyhold mines was agreed to be granted to him by the Duke of Buccleugh, for a further term of twenty-one years. The five managing partners had also in the meantime been in treaty with Mr. Towneley for a new lease to be granted to them of both the copyhold and the freehold mines, including the Bankwell colliery, and on the 12th of August, 1846, they agreed for a new lease of all those mines for a further term of twenty-one years. In September, 1846, they issued handbills and published advertisements for the sale of the stock at the several collieries on the 29th of September, 1846, and they sent copies of the handbills to the other part-

ners, with the following notices indorsed thereon: "We, the undersigned, John Haigh, James Collinge, Bernard Edmondson, John Barrowclough and James Green, being five of the partners or persons interested in the stock in trade described in and by the within advertisement, and having made arrangements with Peregrine Edward Towneley, Esq., the landlord of the premises, for granting of a fresh lease to us of the same or other premises adjoining or near thereto upon and after the expiration of the present lease on the 29th day of September, instant, hereby give you notice that we do intend, either by ourselves or by some other proper person whom we shall appoint as our agent for that purpose, to bid at the sale by public auction to be held at Cliviger, on the said 29th day of September, instant, pursuant to the within advertisement, for the purchase of certain parts of the stock in trade and effects described and comprised in the within advertisement. And we hereby further give you notice, that it will be lawful and competent for you and all other persons whomsoever, also to bid at the same sale for all or any part of the said stock in trade and effects, subject to such conditions of sale as will be produced at the said sale."

The conditions of sale referred to in the above notice were, as it appeared, prepared by one of the managing partners. The stock at the collieries was accordingly put up to sale by auction on 29th September, 1846, and the principal part of it was purchased at the auction by or on behalf of the managing partners. The managing partners then proceeded to have the accounts of the partnership made up and a release prepared, and on the 7th of October, 1846, their solicitors sent to the plaintiff, Jane Clegg, the following letter: "Madam:—We are instructed to inform you that the partnership in the Cliviger collieries expired on the 30th of September last, and that the stock and effects of the said partnership have been sold and converted into money; and also that the accounts of the said copartnership are now being made out by an experienced professional accountant, and will be ready for inspection and examination on and after the 15th day of October instant. And we are also to inform you that the managing partners in the said late copartnership will attend at the Swan Inn, at Burnley, on the said 15th day of Octo-

ber, at ten o'clock in the forenoon, for the purpose of producing the said accounts for your inspection and examination, and they will be prepared then and there to pay to you your due proportion of the said partnership estate and effects upon your executing a proper release for the same."

Neither the plaintiff, Jane Clegg, nor any of the other plaintiffs, in any manner adopted or acted upon the accounts or executed the release, and consequently what upon the accounts was coming to the estate of Henry Clegg was paid into a bank to answer the claim of that estate, and what was coming in respect of the share of John Green of Lamb Row, was left in the hands of James Green. The managing partners and some of the other partners took what was coming to them upon the accounts, and executed the release.

On the 11th of December, 1846, the new lease to the managing partners was executed, being a lease for a term of twenty-one years from the 29th of September, 1846. From the termination of the partnership the mines were worked by the managing partners upon the terms of the new lease, and were so worked without interruption until the filing of this bill in the year 1855.

There were other matters of account between the plaintiffs and the defendants, James Green, Dewhurst and Chaffer, and in the year 1847 these matters were settled and a release executed by the plaintiffs to those defendants. By this release the plaintiffs expressly reserved their claims to a continuing right of participation in the effects of the partnership, including the renewed lease.

There were some other mines at Altham, distinct from and of greater value than the Cliviger mines. The estates of Henry Clegg and of John Green of Lamb Row, were entitled to shares in the Altham colliery. The managing partners of these mines, amongst whom was one of the defendants sought to be made liable in this suit, had, in the year 1846, obtained a new lease of those mines, which they insisted upon holding for their own benefit. The plaintiff, Jane Clegg, and the defendants, James Green, Dewhurst and Chaffer, stood in the same relation to each other with regard to the Altham colliery as with regard to the Cliviger colliery, except that in the case of the Altham colliery those defendants were among

the persons sought to be excluded from the benefit of the renewed lease. In the year 1849, the plaintiff, Jane Clegg, and some other of the excluded parties, instituted a suit of *Clegg v. Fishwick*, for the purpose of subjecting the new lease of the Altham mines to a trust for their benefit, and in December, 1852, they obtained a decree in their favor in that suit. See 1 Mac. & G. 294. In the year 1848, a suit of *Collinge v. Collinge* was instituted by the persons claiming under the will of Giles Collinge, against James Collinge and Felix Leach, the executors of Giles Collinge, in which a decree was made in the year 1855, establishing the rights of the parties interested under the will of Giles Collinge to a share in the colliery carried on under the lease of the 11th December, 1846. This decree was appealed from, and the appeal was compromised by a consent order dated the 19th of July, 1855, upon terms very beneficial to the parties interested in the estate of Giles Collinge.

The plaintiffs, throughout the whole period which elapsed from the renewal in 1846 up to the institution of this suit, insisted on their right to participate in the benefit of the renewed lease, and it was not alleged that any of the defendants had ever been led to suppose, or had supposed, that the plaintiffs had abandoned their claim. No step, however, was taken by the plaintiffs to enforce their rights until this bill was filed in the month of September, 1855. The plaintiffs alleged that they had abstained from taking proceedings until the suits of *Clegg v. Fishwick*, and *Collinge v. Collinge* had been disposed of, inasmuch as they considered that the result of those suits would decide the question raised in the present suit. It was established in the cause that the mine, from 1846, had been uniformly profitable.

The case first came before the lords justices, on an appeal from an order of the master of the rolls, allowing exceptions to the answer of the defendants, who had declined to set out the accounts of the business. That appeal was not disposed of, but an arrangement was come to that the cause should be heard by their lordships on an early day.

Mr. ROUNDELL PALMER and Mr. LITTLE, for the plaintiffs.—
Apart from the question of delay, our right to participate in

the benefit of the renewed lease is clear: Lewin on Trusts, page 170; (2d ed.) Tudor's Lead. Cas. in Equity, Vol. 1, page 35; *Rakestraw v. Brewer*, 2 Peere Wms. 511; *Rawe v. Chichester*, Ambl. 715; *Fitzgibbon v. Scanlan*, 1 Dow, 269; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Cook v. Collingridge*, Jac. 607; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & C. 41; *Gillett v. Peppercorne*, 3 Beav. 78; *Blisset v. Daniel*, 10 Hare, 493, 523. The notice of dissolution makes no difference. An actual dissolution would not have done so, for the new lease is attributable to the partnership assets, which were the property of all, and the new lease must therefore inure to benefit of all: *Cook v. Collingridge*, Jac. 607, 619; *Brown v. De Tustet*, Ib. 284. That a new lessee was introduced makes no difference: *Edwards v. Lewis*, 3 Atk. 538; nor does the circumstance of the lease of 1846 containing a proviso against alienation. The same circumstance occurred in *Clegg v. Fishwick*, 1 Mac. & Gor. 294. Then as to delay, the case is wholly different from *Norway v. Rowe*, 19 Ves. 144, *Senhouse v. Christian*, Ib. 157, cited, and *Prendergast v. Turton*, 1 Y. & C. C. C. 98, affirmed 13 L. J. (N. S.) Ch. 268, where the property was speculative. Here the business has been uniformly profitable from its commencement. Moreover those cases proceeded on the ground that a person is not at liberty to lie by and let other persons incur the risk alone without offering to share it, and then come in for a share of the benefit. Here we continually insisted on our right; we were willing to take our share of the risk, but the defendants would not let us. That they alone incurred the risk is their fault, not ours, and they can not use it as an argument against us. We told them that we should wait until the case of the Altham mines was discussed, which involved the same principle. It was not decided till December, 1852, and it was reasonable that we should wait till then. In *Brown v. De Tustet*, Jac. 284, the delay was excused on a ground not so strong as ours; and *Wedderburn v. Wedderburn*, 4 M. & C. 41, affirms the principle. In the former case there was a delay of six years; in the latter, twenty. *Hart v. Clarke*, 6 De G., M. & G. 232, affirmed 6 H. L. Cas. 633, supports our case, on the ground that there was not any lying by, but a constant assertion of our right.

Mr. SELWYN and Mr. ROXBURGH for Edmondson, Barrowclough, and James Haigh.—We admit that a right to an account of the dealings and property of the old partnership once existed, but we say that it is barred by lapse of time. As to the renewed lease, we say that the plaintiffs never had any right to it, and that if they had they have lost it by delay. This was a partnership at will, which could be dissolved at any time by any partner, and we contend that it was effectually dissolved as against the plaintiffs in 1846. It is alleged against us that before 1846 we executed works which could not pay unless we obtained a new lease, and that we left large masses of coal in order that the new partnership might have unfair facilities in working. Now Mr. Towneley, so far as regards the copyhold mines, was only a termor, whose term expired in 1846, the freehold being in the Duke of Buccleugh; and it is absurd to suppose that we expended capital in the expectation of obtaining a new lease from the Duke of Buccleugh, with whom we had no connection. We had a right to dissolve the partnership in 1846, and to discharge for our protection all the liabilities which the partnership was under to Mr. Towneley. Notice was given to the plaintiffs of what we intended to do, and they had the same opportunities as we. The argument of the plaintiffs proceeds on a series of fallacies. They say that this case is on all fours with *Featherstonhaugh v. Fenwick*, 17 Ves. 298, and the other cases of that class; but in those cases there was unfair dealing, and there is no rule to prevent a partner from dissolving a partnership and taking a fresh lease to himself if his mode of proceeding is fair.

[The Lord Justice Knight BRUCE.—Does not the application of the rule depend upon this—who were entitled to the interests the existence of which gave facilities for obtaining a new lease?]

[The Lord Justice TURNER.—Do you say that a trustee could renew for his own benefit?]

We admit that a trustee could not renew for his own benefit, but here there was no trust. The parties were similarly interested, all was open and above board, and the plaintiffs might have applied for the renewed lease themselves. In most cases it can not be known what the result of an applica-

tion by the party who complains of exclusion would have been. Here the evidence shows plainly that the landlord would not have granted a renewal to the plaintiffs. We had told the plaintiffs long before the renewal that we would rather abandon the mine than go on in partnership with them. Under these circumstances, we being unwilling to continue the partnership and the landlord being willing to grant a new lease to us but not to them, and they having notice of our intention to renew for our own benefit, are we, because we took a renewal, to be treated as having entered on a fresh term of partnership?

[The Lord Justice TURNER.—Can a partner renew for his own sole benefit before the expiration of the term which was partnership property?]

We say that he may, in circumstances like those of the present case. If the plaintiffs meant to claim the benefit of the renewal, they ought to have given a counter-notice that they should insist upon a share in the benefit of the renewal. If we had actually agreed at the time to give the plaintiffs what they are now asking, they could not have had it now. It would have been a case of specific performance, and they would have been barred by delay. As to the continual claim it makes against the plaintiffs, it shows that they were fully aware of their rights, and knew that their title was disputed; yet they took no active step: *Heaply v. Hill*, 2 S. & S. 29; *Chesterman v. Mann*, 9 Hare, 206, 214. The delay to 1852 is not sufficiently accounted for, since we never gave the plaintiffs to understand that we would be bound by the result of *Clegg v. Fishwick*, and the delay from 1852 to 1855 is not accounted for at all. In all the cases relied upon by the plaintiffs, there was *mala fides*. In *Featherstonhaugh v. Fenwick*, 17 Ves. 299, 300, stress is laid on the circumstance that the lease was applied for without notice to the other parties. In *Blissett v. Daniel*, 10 Hare, 493, there was an unfair settlement of accounts. Cases as to trustees and executors have no real bearing on the question; this disposes of *Edwards v. Lewis*, 3 Atk. 538, and *Griffin v. Griffin*, 1 Sch. & Lef. 352. Supposing, however, that this point is decided against us, the doctrine of *Prendergast v. Turton*, 1 Y. & C. C. C. 98, S. C., on appeal, 13 L. J. (N. S.) Ch. 268, applies. The decision

in that case was founded on the risks inseparable from all mining property, and time runs from the commencement of expenditure. The claimants knew that we were incurring great expenses and risks; that there was a profit does not prevent time from running. They knew nothing about that, and if they had known of it, still a loss might have occurred any day, which would more than absorb all the previous profits, and we should have had no right to call upon them for contribution. The rule is, that a person who means to claim an interest in these hazardous undertakings must take to them for better or worse within a reasonable time: *Hart v. Clarke*, 6 DeG., M. & G. 232. 6 H. L. Cas. 633, was taken out of the application of the rule by the fact that the plaintiff had a legal estate. Here the bill was not filed for eight years after the alleged right arose, and not until more than two years after the decision in *Clegg v. Fishwick*.

Mr. CAJENS and Mr. GIFFORD, for James Green and other defendants.—The right of partners to the benefit of a renewed lease must depend upon circumstances. Here the landlord was equally accessible to all, the negotiations for a new lease began with him, and he wished to get rid of a number of useless lessees and have only a small body to look to. The plaintiffs were aware at the time of what was going on, and had distinct notice that those who were managing the mine intended to acquire a new lease for themselves, not for themselves and the plaintiffs. James Green can not be regarded as a trustee even by implication. We contend, then, that *Featherstonhaugh v. Fenwick* does not apply, and that, even if a bill had been filed within a reasonable time after the renewal, it must have failed. Then after the renewal the plaintiffs lie by to see how the concern will turn out. There is no pretense that the defendants practiced any concealment, and every argument which the plaintiffs use in support of their original right tends to make their case worse on the point of delay. Up to the time of the filing of the bill in *Clegg v. Fishwick*, nothing was done beyond making parol claims. It would be unjust to attach any weight to such claims (*Attorney-General v. Sheffield Gas Consumer's Company*, 3 De G., M. & G. 304), as it would be allowing the claimant to keep up a one-sided state of things; for such a

claim would not entitle the other party to call on him for contribution. Time must run from the time when the parties were first aware of their rights. In the case of the Altham mines it could not begin to run till 1849; here in 1846. Moreover, the renewal in the former case was clandestine; here it was not. The pendency of that suit is not an excuse for delay; we had not agreed to be bound by the result of it. The decree, if any decree is made at all, should give an account only from the filing of the bill. A receiver and manager to carry on the mines ought not to be appointed, for we decline partnership with the plaintiffs; and a receiver should only be appointed with a view to a sale: *Roberts v. Eberhardt*, Kay, 148; *Crawshay v. Maule*, 1 Swanst. 495, 523. If a bill had been filed in 1846, all that the court could have done for the plaintiffs would have been to give them a decree for dissolution with a sale, and they ought not to have any more now. To give them more would be to give them the benefit of our labor and of the risk which we have run by taking a new lease with burdensome covenants: *Townshend v. Warren*, 1 Jones & Lat. 221, n.; *Hardman v. Johnson*, 3 Mer. 347; *Randall v. Russell*, 3 Mer. 190; *Aitcheson v. Fair*, 3 Dru. & War. 524.

MR. ELMSLEY and MR. G. LAKE RUSSELL, for the executor of James Collinge.—The plaintiffs never had any title except in conscience. It is a constructive trust, and their title has no analogy to a legal title: *Bond v. Hopkins*, 1 Sch. & Lef. 413; *Smith v. Clay*, 3 B. C. C. 640. Such a right can not be kept alive by mere assertion of it. Acquiescence is not needed to bar it; mere delay will have that effect, as in cases of specific performance; and here, not to dwell on other periods, there is delay from 1852 to 1855 wholly unaccounted for.

MR. HAMILTON HUMPHREYS and MR. POLE appeared for other defendants in the same interest.

MR. PALMER, in reply.—In suits in equity time has to be considered in two different ways: as to its effect in barring a right to property, and as to its effect in barring an equity enforceable against property. The defendants confound these two

operations. Here we claim a proprietary right. There is the identical plant, and the mine, which, though not identically the same, is the fruit of the property in which we had a share. This proprietary right, if legal, would not have been barred till the expiration of twenty years, and, by analogy, a less period will not have that effect in equity. To shorten this period, acquiescence amounting to an assent to the retainer of the property by others must be established; conduct which leads other parties to believe and to act on the belief that the title will not be enforced; and this makes it a breach of faith afterward to enforce it: *Hawker v. Halliwell*, 2 Jur. (N. S.) 537, 794; *Prendergast v. Turton*, 1 Y. & C. C. C. 98; 13 L. J. (N. S.), Ch. 268; *Hart v. Clarke*, 6 De G., M. & G. 232; 6 H. L. Cas. 633, all recognize this as the principle. Here there was nothing approaching to acquiescence. Our delay did not induce the defendants to alter their position. Whatever they may now say, it is absurd to suppose that our claiming to be partners in 1846 would have induced them to abandon the concern; it was too profitable for them to take such a step. The undertaking was not an "adventure," for the mine had been proved and was a known profitable concern. The defendants acted with full notice of our claim, and were in no way misled. We have left nothing undone which we should have had to do if we had been acknowledged all along as partners, no contribution to expenses having been required. If the defendants intended to insist on time as a bar, they ought to have given us notice to enforce our claim within a reasonable time. They have not done so, and having been aware all along that we insisted on our right, they can not insist upon so short a period as a bar: *Penny v. Pickwick*, 16 Beav. 246.

Judgment reversed.

March 17.

The Lord Justice TURNER, after stating the facts to the effect of the above statement, proceeded as follows: It will be convenient, first to consider the case as it stands upon the lease of 1846. The *onus* of this case rests, as I think, upon the defendants, the managing partners. Having stood in a confidential relation, both as partners and as managers, the consequences which, according to the ordinary rules of this

court, flow from that relation, must attach upon them, unless they can by some means exonerate themselves from those consequences. The case on their part was put upon two grounds: 1st, that the plaintiffs never were entitled to the benefit of the new lease; and, 2dly, that if the plaintiffs were at any time entitled to the benefit of that lease, they have lost that right by delay and acquiescence.

The defendants' argument on the first point was rested on several grounds: that the partnership which had subsisted to the 29th of September, 1846, was a partnership at will only; that the landlord would not have renewed to all the partners; and that all the partners knew of the intention on the part of these defendants to apply for the new lease, and had the same means of applying to the landlord on their own behalf as these defendants themselves had. The argument founded on the partnership being dissoluble at will, is not, I think, entitled to any consideration. The principle on which the court proceeds in cases of this nature is, the confidence which subsists between partners, and that confidence exists whether the partnership subsists for a limited time or is dissoluble at will. I attach as little weight to the argument founded on the landlord's objections. That argument is, I think, disposed of by Lord ELDON's judgment in *Fitzgibbon v. Scanlan*, 1 Dow, 269. More consideration is, I think, due to the argument founded on the knowledge by all parties of the intention of these defendants to apply for the lease, and the means which the other parties had of applying for it themselves. I am not prepared to say that in no case can a partner, during the continuance of the partnership, contract for a new lease to be granted to himself, of property which is in lease to the partnership, without the new lease being held to be subject to trusts for the benefit of the partnership. The authorities, I think, do not warrant that position; but this, I think, is plain upon all the authorities: that it is very difficult for any partner to secure to himself, to the exclusion of his copartners, the benefit of a lease so contracted for; and the difficulty is certainly greater where the contracting partners are, as in this instance they were, the managing partners. In order to give validity to such a transaction, all the parties ought to be placed upon an equal footing, and it is

difficult to see how this is to be accomplished in the case of managing partners. It is not, however, necessary to decide what would be held sufficient to support such a transaction in the case of managing partners. It is sufficient for me to state that the mere communication of the intention on the part of the managing partners to apply for the new lease for their own benefit could not, in my opinion, be sufficient for the purpose. I do not find that the defendants, the managing partners in this case, made any further communication, and I am of opinion, therefore, that upon the first point the defendants' case can not be supported.

We have to consider, then, the question of delay and acquiescence, and in determining the effect due to these considerations, we must take into account both the nature of the right which is claimed and of the property in which it is claimed. We have to deal, in this case, not with a direct but with a constructive trust, not with property subject merely to the ordinary contingencies by which all property is affected, and maintained at a moderate and scarcely varying expense, but with mining property, which is subject to extraordinary contingencies, and which can be rendered productive only by a large and uncertain outlay. The authorities, I think, fully warrant us in saying that the rules which govern cases of direct trust, and apply to property of an ordinary character, are not equally applicable to cases of constructive trust, and to property of the description which we have here to deal with. It was said indeed, on the part of the plaintiffs, that these mines had been tried, and that there was no uncertainty attaching to the value of them; but I do not find from the evidence that they had been explored to any such extent as could render their value certain, and, on the contrary, the evidence shows that faults were met with in the workings under the new lease, and the expense of the workings would, of course, depend upon the nature and extent of these faults. What expenditure they would occasion, or to what extent they would affect the value of the mines, could not, of course, be foreseen. If they had led to ruinous expenditure, and had rendered the mines unproductive, nothing would, of course, have been heard of this claim of the plaintiffs, and there would have been no claim against them. Are

they then in justice entitled to reap the benefit when they could not have been made subject to the loss? It is said for the plaintiffs that the expenditure has been more than met by the profits, but this does not seem to me to vary the case, for the profits undoubtedly belonged wholly to the lessees, unless the plaintiffs were entitled to share in them, and to assume that the lessees were not expending their own money would be to assume that the plaintiffs were so entitled, which is the very question we have to decide. Now what has been the conduct of these plaintiffs? Before the termination of the old partnership they knew that the defendants intended to apply for the new lease, if not that it had been actually agreed to be granted. They took no steps to prevent the lease being granted. From the period of the termination of the old partnership they have known that the defendants have been working these mines and incurring expenditure upon them, and until the filing of this bill in the month of September, 1855, they have not taken a single active step in prosecution of the claim which they have now set up.

This conduct on their part is, I think, sufficient to shift the *onus* of the case and throw it upon them. Then what is their justification? There is an attempt to show something like an agreement that the claim to an interest in these mines should abide the result of the claim to an interest in the Altham mines, but I am satisfied upon the evidence that there was no such agreement. Then the claim to the interest in the Altham mines, and the pendency of the suit respecting it and of the suit of *Collinge v. Collinge*, were relied on without reference to the alleged agreement. But the suit as to the Altham mines was not instituted until the year 1849, and upon this footing, therefore, a period of two years is left wholly unaccounted for. Besides, both that suit and the suit of *Collinge v. Collinge* were instituted not long after the cause of suit arose, the Altham suit having been instituted in 1849, almost immediately upon the termination of the old lease of those mines, and the suit of *Collinge v. Collinge* having been instituted in the year 1848, and what might be done in suits commenced at more early periods could furnish no rule for what would be right to be done in a suit like the present instituted after the lapse of so many years.

What the plaintiffs, however, mainly relied upon, was the continual claim on their part, and no doubt they have not ceased to assert their claim, but I can not agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded. I am not aware that the mere assertion of a right has ever been held to avail against the Statutes of Limitations, and if, therefore, we look to the analogy of those statutes, that analogy does not seem to furnish any ground of excuse on the part of the plaintiffs. Much less, I think, can such an excuse be entertained by a court of equity, which, in cases of this nature, has gone beyond the analogy of the statutes. In my opinion, therefore, the defendants are entitled to our judgment in their favor upon this second point of their defense.

It was attempted on the part of the plaintiffs to derive some aid to their case as to the lease of 1846, from the fact of the lease of the Bankwell colliery not having expired when the lease of 1846 was granted, and the plaintiffs also contended that in any event they were entitled to fix a trust upon the Bankwell lease; but it is clear upon the evidence that the lease of the Bankwell colliery was not originally taken for the benefit of the partnership, and that that colliery was not worked after 1841, and that it ceased to be worked at that time in consequence of objections raised by the partners in the concern in which the plaintiffs were interested, and the lease, as I understand the case, is not now subsisting, but was put an end to by the arrangement of 1846, and under these circumstances I think the plaintiffs can derive no aid to their case from the subsistence of that lease, and are entitled to no relief in respect of it. The reasons which have been assigned against fixing a trust upon the lease of 1846 apply with greater force against any equity which the plaintiffs might have had to set up as to the lease of this colliery.

A case is also made by this bill as to the sale of the plant; but I think the same reasons which govern our decision as to the other parts of the case apply to this part of the case also. The plaintiffs had notice of this sale, and that the managing partners intended to bid. They might if they had thought fit have attended the sale and have bid for themselves, and

they were invited to do so. They might have impeached the sale, as they might have impeached the lease, at a more early period, but at this distance of time I think they can not be permitted to do so. If they desire an account of the proceeds of the sale and of the profits of the mines from the date of the last settlement on their behalf, I think they are entitled to it, reserving the costs, but in other respects I think this bill must be dismissed, though certainly without costs.

The Lord Justice Knight BRUCE.

In the observations that I propose to make on this cause it may be convenient, and it is my intention, to describe the persons in whom from time to time and for the time being, ever since the year 1845, have been vested the rights, interests, and claims upon which the plaintiffs found their case and are proceeding—to describe them all, I say, including the plaintiffs, by the single name of Robert Clegg, one of the number; and although James Collinge, lately a defendant, is dead, to designate by his single name all the lessees named in the lease in dispute, namely, that of December, 1846, and those who from time to time have claimed the benefit of it adversely to the persons whom I describe under the name of Robert Clegg. I think it an immaterial circumstance that one of the lessees of December, 1846, was not (if in truth he was not) interested in or under the lease that expired in September, 1846, for all the others of them were so interested. Nor do I consider it necessary to decide the question whether the lease of December, 1846, was a lease in the benefit of which Robert Clegg was entitled to participate; I assume Robert Clegg to be entitled to have that question decided in his favor, but decided subject to the other defense or defenses on which James Collinge, upon that hypothesis, relies.

The trust, however, by which I thus assume James Collinge to have been affected as to the lease, was what lawyers call a constructive trust, not one declared or expressed; and there are some considerations applicable to the former that are inapplicable to the latter, as various authorities show. Here the right of Robert Clegg (a right merely equitable) arose from his beneficial interest in a former lease or former leases of the mines comprised in that of December, 1846, which former lease or former leases had expired in or before the

preceding September, in which James Collinge had also been interested, and under which he was, on behalf of all interested for the time being, the worker and manager of the mines throughout September, 1846, and for a considerable period next before that time.

Now, the bill in this cause was not filed before September, 1855, and the main subject of dispute being an alleged equitable right to participate in the profits of mines, a right which commenced, if at all, in the year 1846, the question arises whether the suit has been instituted too late. Can Robert Clegg, under such a bill, obtain the relief which he would, I assume, have been entitled to obtain if he had commenced his suit in 1846 or early in 1847? He was not in the year 1845, nor has at any time since, been under any disability, and he has, ever since the determination of the last expired lease, been uniformly excluded from the mines and all participation in their produce or profits, perfectly aware during the whole time of his alleged rights, nor ignorant of any material fact, and especially not ignorant that his title and his claims were uniformly denied and opposed, as they were uniformly denied and opposed by James Collinge; he nevertheless, as I have said, institutes no suit until September, 1855; nor was James Collinge on his side ignorant of any material fact at any time, and especially he was all along aware that Robert Clegg, deeming the exclusion wrongful, alleged continually a title to participate in the profits. But Robert Clegg did nothing. James Collinge, on the other hand, was continually working the mines, expending money and bestowing his time, labor and skill upon them with a view to his own profit alone.

Robert Clegg's apologies for delay are, that he continually claimed and did so to the knowledge continually of James Collinge; that there is no bar from any Statute of Limitations; that if the subject in dispute had been an ordinary farm of which James Collinge had been receiving the rent, instead of mines which he worked, there would have been no answer to the suit; and that the mines having been (as they have in fact been) uniformly prosperous, nor having required (as in fact they have not required) any outlay which the produce did not more than meet and cover, and James Collinge having, from his long acquaintance practically with the property, known (as he must

be taken in fact to have known) all along its probable safety and probable advantages, there is no reason for treating or dealing with the claim, otherwise than as a similar claim in respect of an ordinary farm of which James Collinge had been receiving the rents might properly be.

This argument is plausible, but has not convinced me. A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination, afford a sure guarantee against sudden losses, disappointments and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should show himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing.

There was here, in my opinion, no sufficient apology, no excuse for the delay from 1846 to 1855. The existence of the suit respecting the Altham mine was and is immaterial, and even that suit, commenced not before the year 1848, was determined in or before 1853. I think, therefore, that as to the lease of December, 1846, and the produce of the mines from the expiration of the lease that expired in September, 1846, the bill should be dismissed, but, I agree, without costs.

If the plaintiffs desire an account of what, if anything, is due to them in respect of produce and profits before that expiration, without disturbing or going above the last settled account, which I understand to have been in 1845, I think that they may have it; and they should be paid, I conceive, with interest, their shares of the value of the rails, plant and stock, in and about the mines at that time. But after the full notice given in September, 1846, of the intentions of the new lessees, the knowledge that all concerned then had, and the length of time allowed to pass before the commencement of the suit, the plaintiffs must, in my opinion, be bound by the prices produced at the sale, however irregular the biddings, and however null the proceedings would, to a great extent at least, have probably been deemed to be, if properly disputed in good time. As to these portions of the case,

however, the parties can, I suppose, with respect both to principle and to interest, make an arrangement among themselves without prejudicing any right of appeal to the House of Lords as to the residue.

SHARP V. WRIGHT.

(23 Beavan, 150. The Rolls Court, 1859.)

¹**Royalty implies covenant to work.** An agreement for a lease calling for no rental except the royalty out of coals to be dug *construed* to require the lessee to commence working immediately and to proceed continuously.

²**Delay prevents specific performance.** In March, 1850, defendant agreed to grant the plaintiff a lease of twenty-one years on a coal mine. Three months after, defendant gave notice that unless plaintiff commenced work in a month, he would consider the agreement abandoned. Two years after, plaintiff entered and commenced working but was resisted by defendant. The working, however, proceeded, until abandoned in 1853. Five years later plaintiff attempted to resume work, and filed a bill for specific performance. It was dismissed, with costs, on the ground of laches.

By articles of agreement dated on the 9th of March, 1850, the defendant agreed to grant the plaintiff a lease of some mines and seams of coal. The agreement was in the following terms:

"Jacob Wright hereby agrees to demise and let unto John Sharp, who hereby agrees to accept a lease of all the mines and seams of coal under three fields containing sixteen acres, or thereabouts, situated near Brentwood, named the Fore, High and Middle Labsdale Fields, on the terms following: The first or top seam to be paid for at and after the rate of one shilling and sixpence per score of twenty peck tubs (three and twenty tubs to the score), all other seams below to be paid for at and after the rate of two shillings and sixpence per score of twenty peck tubs (three and twenty tubs to the score), for all coals drawn out of the said seams before mentioned. The land used to the extent of half an acre for sinking the pit on and other purposes, to be allowed free of any

¹ *Love v. Mabury*, 59 Cal. 484.

² *Pollard v. Clayton*, 1 Kay & J. 462; *Post* SURFACE SUPPORT.

rent or damage; but all land above that quantity to be paid for according to the value thereof. The said John Sharp to be allowed full powers of outstroke and instroke into the adjoining royalties. The coal to be worked in a fair and proper manner, and all usual privileges granted in leases of coal on the Wear and Tyne to be allowed the said John Sharp; but the coal belonging to Jacob Wright as aforesaid to be worked first, in preference to any other. But should the coal in adjoining royalty belonging to John Bowes, Esq., be brought out of the shaft on the lands of the said Jacob Wright, a shaft rent of twenty pounds per annum to be paid for the use of the said shaft, for all coal brought out of it or any other royalty adjoining. *The rent to be paid quarterly; the lease to be for a term of twenty-one years.*"

The plaintiff not having proceeded to work the coal mines agreed to be demised, the defendant, on the 15th of June, 1850, gave him notice that unless he commenced working the coal within one month he should consider the agreement null and void.

The plaintiff did nothing until September, 1852, when persons acting under him entered upon the land and commenced sinking a pit. The defendant forcibly resisted these proceedings, and was, in consequence, summoned before the magistrates for an assault; the magistrates, upon the defendant's promising not to molest the men working, merely ordered him to pay the costs of the summons. The men then proceeded to sink a pit, but in February, 1853, the plaintiff finding it unprofitable altogether abandoned working it.

This continued until June, 1858, when the plaintiff again made an attempt to resume working, which was resisted by the defendant; and in November, 1858, the plaintiff instituted this suit to compel the defendant specifically to perform the agreement and grant the lease in accordance with it.

The defendant insisted that the agreement had been unfairly obtained from him, and that it was improvident in its terms, for that all such leases in the neighborhood usually reserved a "fixed or sleeping annual rent," and which was made payable, whether the colliery was worked or not, and for which a definite quantity of coal might be worked, but thereby securing the working of the mine by the lessee.

Mr. R. PALMER and Mr. BATES, for the plaintiff.

Mr. SELWYN and Mr. FABER, for the defendant. (*Mao-bryde v. Weekes*, 22 Beav. 533.)

THE MASTER OF THE ROLLS, SIR JOHN ROMILLY.

I am of opinion that the plaintiff is entitled to no relief. On the construction put on this agreement on behalf of the plaintiff, he was not bound to work at all during the twenty-one years, unless he found it profitable; but I think the construction of this agreement is, that the plaintiff was bound to work it immediately and continuously. No one, it is true, can know whether it could be worked out in twenty-one or any other number of years; there is no evidence on the subject.

The case is this: The agreement expressly directs how the mine is to be worked, and the rent is made payable quarterly, clearly inferring that it was to be worked immediately. That is the construction which was put on it from the commencement by the defendant, who said, "If you do not commence working in a month I shall consider our agreement at an end." The plaintiff took no steps for two years, and then when he came on the ground he was resisted by the defendant. Some violence was used and he was treated as a mere trespasser; they go before magistrates in Durham, who consider the case, and finding there had been an assault, say, "If you agree not to molest the workmen we shall merely make you pay the costs." A shaft was then sunk, but there was no working of the mine, and it was abandoned until 1858. In 1858 the plaintiff, finding the price of coal improved so as to make it profitable to work this mine, then attempts to renew the works, but he is again resisted, and in November, 1858, that is about eight years after the contract had been entered into, he files this bill for specific performance.

It is not necessary to refer to the cases on this subject, but I think that *Southcomb v. The Bishop of Exeter*, 6 Hare, 213, goes much further than is necessary to enable the court to say, in this case, that the bill must be dismissed with costs.

ERNEST V. VIVIAN.

(33 Law Journal Chancery, 513. Court of Chancery, 1864.)

¹Laches applied to sale of mine. The defense of laches applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property.

Purchaser subrogated to rights of vendor. Where property of which a defective lease has been granted is subsequently sold, the purchaser takes the property subject to the burden of any delay of which the vendor may have been guilty; and in reference to a defense founded on laches, the purchaser can stand in no better position than the vendor would have done if he had never parted with the property.

Bill to set aside lease and for an accounting—Laches defeats attempt to avoid the lease. A was tenant for life of estates, with an ill-defined power of leasing the minerals thereunder. In 1840 he granted a lease of the mines for a long term of years, and died the same year. B, the remainderman in tail to the property, was then an infant. He entered into possession and attained his majority in 1846, when he executed a disentailing deed. He then first discovered the existence of the lease granted by A, and protested against the validity of it, as not being authorized by the power, and as being obtained by fraud; and he refused to receive the rents and royalties reserved thereby. In 1852 he agreed to sell the whole estate to E, but with a stipulation that he should receive the rents and profits of the mines of the estate until August, 1856. In 1855 B and the representatives of E, who had died, conveyed the whole property to the plaintiff in this suit, who had throughout acted as B's agent. B died in 1856. In 1860 the plaintiff filed this bill, alleging that he had then first ascertained the nature of the lease of 1840, and the circumstances under which it was granted, and praying a declaration that it was void, or that it was obtained by fraud, and ought to be set aside and an injunction, or in the alternative, if the court should think the lease valid, then for an account and further relief. *Held*, that on the ground of laches alone, the plaintiff was not entitled to a decree on the first part of his prayer, and the bill must be dismissed; but without prejudice to his filing a bill for an account on the footing of the validity of the lease, or to his taking such proceedings at law as he might be advised.

Purchase without notice. The defense of purchase for valuable consideration, without notice, is available when the subject-matter purchased is an equitable estate.

This suit was instituted by Henry Ernest, for the purpose of setting aside a mining lease under the following circumstances.

¹ *Clarke v. Hart*, 6 H. L. Cas. 655.

Leonard Bilson Gwyn, by his will, dated the 25th of March, 1798, after devising certain estates, not including one called the Cadley estate, to trustees, for the payment of his debts, devised the residue of his real estates, including the Cadley estate and the mines thereunder, to his daughter, Catherine Middleton Gwyn, for her life, without impeachment of waste, otherwise than by his will was afterward mentioned; with remainder to trustees to preserve contingent remainders with remainder to the sons and daughters of his daughter, and the heirs of their respective bodies, and in default of such issue, to such one of the several persons named in the will, and the heirs of their respective bodies, as his daughter should by will devise the said estates unto; but in case she made no will of the said estates, he devised them to his nephew, the Rev. Thomas Powell, and the heirs of his body. The will then contained a power for Catherine Middleton Gwyn, and all persons entitled in possession under the limitations of the will, to grant surface leases for twenty-one years, at the best improved rent to commence in possession, and not in reversion; the tenants to be restricted from the commission of waste, and from assigning their interest, without the consent of the lessor, with a special reservation to the lessors for the time being during their respective lives, of a right to dig for and carry away minerals, and to cut timber. And the testator declared that it should be lawful for his daughter to work or contract for, lease, or set out to be worked and wrought, all mines and minerals under such of his real estates as were not specially devised for payment of his debts, legacies and funeral expenses, and that all issues and net proceeds and profits arising therefrom should be paid over by his daughter to his trustees and their heirs, and be by them in the first place applied in payment of debts, in case the personal estate and real estate therein before devised should prove insufficient, and after payment thereof, in the purchase of real estates, to be settled to the same uses as his real estates not specifically bequeathed for payment of debts were thereby settled.

The testator died in May, 1798, leaving his daughter, his only child, him surviving, and she afterward married Cæsar Adam Marcus Count de Wuits.

In 1837 Joseph Martin and two other persons, named

Michael Williams and John Henry Vivian, established a company called the "Swansea Coal Company."

On the 2d of May, 1840, the Countess de Wuits, in assumed exercise of the power given to her by the testator's will, granted a lease of the mines under the Cadley estate to Martin, for the term of twenty-one years from the 25th of March then last past, and (if she had power under the testator's will so to do) for the term of sixty years from the same date. The net rent was fixed at £40, with a royalty of 4s. per wey of coal beyond the first 200 weys. The lease contained the usual covenants and stipulations as to notice, etc., and provided that the lessee should not assign it without the consent of the lessor.

Shortly after that lease was granted, Martin retired from the Swanson Coal Company, and in the early part of 1846, agreed with the remaining partners in the company for the sale of the lease to them at the price of £2,500; and accordingly, by a deed dated the 5th of March, 1846, he covenanted with M. Williams and J. H. Vivian to hold his interest in the lease in trust for them; but no actual assignment was made.

The testator's nephew, the Rev. Thomas Powell, died in the lifetime of the Countess de Wuits, leaving Thomas Gabriel Leonard Carew Powell, his grandson and heir-at-law; and in December, 1840, upon the death of the Countess, intestate and without having had any children, T. G. L. C. Powell then became entitled to the Cadley estate, as tenant in tail thereof, under the will. He took the name of Gwyn; and on the 10th of February, 1846, the day after he had attained his majority, he executed a disentailing deed of the estate.

The fact that the above mentioned mining lease had been granted by the Countess to Martin, and that the coal mines were held by the Swansea Coal Company as claiming thereunder was then discovered, and the validity of the lease was strongly protested against by Mr. Gwyn; in fact he refused to receive the rents and royalties, and threatened to take proceedings to set it aside.

In March, 1852, Mr. Gwyn agreed to sell the property to which he was entitled under the testator's will, including the

Cadley estate, to Mr. Joseph Edgar, but with a stipulation that he should continue to receive the rents and profits of the mines and minerals of the Cadley estate till the 2d of August 1856. Joseph Edgar died in December, 1853, having, by his will, duly devised the Cadley estate to Lucy Edgar and Joseph Haythorne Edgar.

Some correspondence had in the meantime taken place between Mr. Gwyn and the solicitors of M. Williams and J. H. Vivian, with respect to the effect of the lease granted by the Countess; and as appeared from the answer of the principal defendants, the result of that correspondence was, that the following notice to quit was served by Mr. Gwyn on M. Williams and J. H. Vivian.

“Sept. 28, 1854.

“**SIR:**—I hereby give you notice to quit and deliver up possession of the whole or so much of the premises described in the schedule hereunder written, now in your possession or occupation, which you hold as tenant, on the 25th of March next, or at the end or expiration of the current year of your tenancy, which will expire after the end of the half year from the date hereof.”

To that notice was appended a schedule containing the same parcels as were in the lease granted by the Countess.

On the 25th of May, 1855, Mr. Gwyn assigned the rents of the estate and the royalties of the mines under them to the plaintiff in this suit, but only until the 2d of August, 1856. On the 28th of September, 1855, Mr. Gwyn conveyed the Cadley estate to Lucy Edgar and Joseph Haythorne Edgar, subject to the plaintiff's rights therein; and on the 29th of September, 1855, Lucy Edgar and Joseph Haythorne Edgar duly conveyed the estate, with the mines thereunder, to the plaintiff.

John Henry Vivian died in 1855, having, by his will, appointed the defendant, Henry Hughes Vivian, his executor, who, upon the death of J. H. Vivian, became a partner with Michael Williams in the Swansea company; and in 1858 Michael Williams died, having by his will duly appointed the defendant, John Michael Williams, his executor, who then joined H. H. Vivian in the partnership. Mr. Gwyn died on the 12th of May, 1860, having by his will duly appointed his

wife and Alfred Atkinson Pollock his executrix and executor, the latter of whom alone proved his will.

In 1860 the plaintiff filed the bill in this suit against H. H. Vivian, J. M. Williams and A. A. Pollock (the executors of J. Martin were made parties by amendment), charging that the lease granted by the Countess in 1840 was *ultra vires* on her part; that it was, in fact, obtained from her by fraud; but that he only knew in 1860 the circumstances under which it had been granted, and praying a declaration that the lease so granted by the Countess was not authorized by the power of leasing contained in the testator's will; or if this court should be of opinion that the Countess had power to grant it, then that it was obtained from her by fraud, and that, in any event, it was not binding on the plaintiff, or those interested in the estates in remainder. The bill also prayed for an account of all coals and minerals got since the Swansea company began to work, and for damages in respect of alleged improper working; for an inquiry as to the possession of the property by the company, and what was due from them, and that the amount, when ascertained, might be paid to the plaintiff; that the defendants, H. H. Vivian and J. M. Williams might be ordered to deliver up the possession of the mines to the plaintiff, and be restrained by injunction from working them; or, if this court should think the lease a valid one, then for an account on that footing, and that the last named defendants might pay the costs of the suit.

The plaintiff did not make any affidavit in support of the allegation in his bill, but a great deal of evidence was gone into to establish the alleged fraud practiced on the Countess when she granted the lease. As, however, the judgment of the vice chancellor proceeded solely on the ground of "laches" on the part of the plaintiff in instituting this suit, it is unnecessary to do more than to refer to the judgment itself for the nature and effect of the evidence adduced.

The defendants, H. H. Vivian and J. M. Williams, by their answer, set out the correspondence which had passed on the subject of the lease, and also the notice to quit of the 28th of September, 1854. They submitted that John Henry Vivian and Michael Williams were purchasers of the lease of the 2d of May, 1840, for valuable consideration without notice; that

the plaintiff purchased the Cadley estate, with full notice of the lease and of the claims of the Swansea Coal Company, which company had been allowed to incur large expenditure in working the mines; and that the plaintiff was barred by laches, acquiescence and lapse of time.

Mr. GLASSE and Mr. LINDLEY appeared for the plaintiff, and contended that the Countess de Wuits had no power under the testator's will to grant a lease of the mines, to endure beyond the period of her own life. They also relied upon the alleged fraud practiced upon her, and on the terms of the lease; which latter they insisted were most improvident, and, in themselves, alone sufficient to render it void against the plaintiff. The plaintiff was clothed with the same equities as Mr. Gwyn would have possessed had he come to the court to set the lease aside and Mr. Gwyn had given the notice to quit in 1854, and had constantly protested against the validity of the lease. At all events, the plaintiff was entitled to the inquiry, and to the accounts for which he prayed by his bill.

The ATTORNEY-GENERAL, Mr. W. M. JAMES and Mr. SPEED, for the defendants, Vivian and Williams, argued that the relief prayed by the bill was inconsistent. The question whether the Countess had power to grant the lease was a legal one, and if so, the plaintiff's remedy was at law by ejectment. They denied the alleged fraud upon the Countess, and insisted that Mr. Gwyn had recognized the lease as valid; and therefore the plaintiff, who upon his own case stood in Mr. Gwyn's shoes, could not question it. He had virtually been guilty of champerty if it were otherwise, for he must have bought a right of suit. Moreover, the defendants were purchasers for valuable consideration without notice. But, above all, the plaintiff was aware of all the circumstances with respect to the lease long before 1860; in fact when he purchased the property from Mr. Gwyn. The lapse of time was, therefore, a bar to him in this court, and amounted to such laches on his part as must exclude him from the relief he sought.

Mr. CHARLES PARKE, for A. A. Pollock.

Mr. MARTINDALE, for the executors of J. Martin.

Mr. GLASSE, in reply.

The following authorities were cited in the arguments.

As to plaintiff's remedy being at law, and not in equity: 25 & 26 Vict., C. 42, S. 4; *Jones v. Jones*, 3 Mer. 161; *Webster v. The South Eastern Railway Company*, 1 Sim. (N. S.) 272; S. C., 20 Law J. Rep. (N. S.) Chanc. 194; *Walters v. The Northern Coal Mining Company*, 5 De Gex, M. & G. 629; S. C. 25 Law J. Rep. (N. S.) Chanc. 633.

As to the case being one to which the defense of a purchase for value without applied: *Phillips v. Phillips*, 31 Law J. Rep. (N. S.) Chanc. 321; *Joyce v. DeMoleyns*, 2 Jo. & La T. 374; *Wallwyn v. Lee*, 9 Ves. 24; *Pinch v. Shaw*, 19 Beav. 500; S. C., 5 H. L. Cas. 905; 26 Law J. Rep. (N. S.) Chanc. 65.

As to laches and acquiescence on the part of the plaintiff: *Clegg v. Edmondson*, 26 Law J. Rep. (N. S.) Chanc. 673; S. C., now reported, 8 De Gex, M. & G. 787; *Prendergast v. Turton*, 1 You. & C. C. C. 98; affirmed on appeal, 13 Law J. Rep. (N. S.) Chanc. 268.

As to the accounts: *The Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Dean v. Thwaite*, 21 Beav. 621.

As to the plaintiff's having purchased "a right of suit": 32 Hen. 8, C. 9; *Prosser v. Edmonds*, 1 You. & C. 481, 498; *Williams v. Protheroe*, 5 Bing. 309; *Scully v. Delany*, 2 Irish Eq. Rep. 379; *Knight v. Bowyer*, 2 De Gex & J. 421.

As to the effect of the notice to quit: *Woodfall's Landlord, and Tenant*, 295; *Pleasant v. Benson*, 14 East, 234.

As to plaintiff not having filed an affidavit: *Norway v. Rowe*, 19 Ves. 144.

As to the relief prayed by the bill being inconsistent: *Cruickshank v. M' Vicar*, 8 Beav. 106; and *Lewin on Trusts* 3d Ed. 752, n., *Whalley v. Whalley*, 2 De Gex, F. & J. 300, were also cited.

KINDERSLEY, V. C. (Dec. 22, 1863), after referring to the facts above stated, continued thus:

The evidence in this case clearly negatives the allegation that Martin agreed with the Countess on behalf of the Swansea Coal Company. He dealt entirely on his own behalf, but not being able to assign his interest in the mines without the consent of the party in possession of the estate, he covenanted that he would hold the lease in trust for Williams and Vivian. Williams and Vivian died. The bill in this suit was filed in December, 1860, against their representatives, praying, first, a declaration that the lease of 1840 was not authorized by the will of the testator; secondly, that if the court was of opinion that the Countess had a right under the will to grant the lease, it might be declared that it was obtained by fraud; thirdly, that it might be declared that it was not binding either on the persons entitled to the Cadley estate in remainder expectant upon the determination of the life estate of the Countess, or on the plaintiff, and that it might be set aside for an account and payment by the defendants, Williams and Vivian, of what should be found due; for delivery up of the mines, and for an injunction to restrain the continuance of the working of them, or in the alternative, that, in case the court should think the lease valid and binding on the plaintiff, then there might be an account of the rents and royalties, etc. To that portion of the prayer I shall advert last.

The relief which is sought by the bill is founded on the one or the other of two distinct grounds, viz., either on the ground that the lease is *ipso facto* in itself void, or that if not void it was obtained by fraud, and ought therefore to be set aside. If the plaintiff is right on the first ground, viz., that the lease is void, his title is purely legal, he having been since August, 1856, as to the minerals, the owner of them in fee, but as such an owner, in the position of a man whose minerals had been wrongfully abstracted. As to the minerals prior to that time they were purchased from Gwyn although the legal title to them was not in the plaintiff, but in the representative of Gwyn, as trustee for the plaintiff, who might have sued at law in the name of such representative, and have then compelled him to convey by bill in equity. But that is no ground for asking equitable relief as against the present defendants. If, therefore, the plaintiff on the first ground has a right to come into equity as between him and the defendants, his right is this:

his remedy was originally at law, but as the subject of the right was minerals, this court will direct an account, which a court of law can not do, because it does not possess the requisite machinery. If the plaintiff were to succeed in setting the lease aside, the inquiries and accounts would seem to follow.

It is not my intention to express any opinion on the question whether the will does or does not contain a power to lease for longer than the Countess' life, nor on the question whether the terms of the lease were improvident, nor whether it was obtained by fraud, because whatever opinion I may entertain on any of those questions, there is one ground of defense insisted on by the defendants which is applicable to each and all of them, appears to me conclusive, namely, laches and delay in applying for relief. The subject-matter of this suit is the right to mines. Mining operations are of a particular character; they are an uncertain and speculative and hazardous adventure. That observation applies more especially to mines unopened or recently commenced, the expense of which is only compensated by a long course of successful working. It is true as to every mine that the preliminary outlay, though the heaviest, is not the only one, for a large capital and an expenditure to a serious amount is necessary to meet the exigencies of the case. There is also a continual and an increasing risk, for a mine profitable to-day may by to-morrow become worthless. Similar observations have repeatedly been made by other judges. Now, if a person has a just right to mines of which he is not in possession, as against those who are in possession of and working them, and if he claims to be the rightful owner (the person in possession being aware of his rights or supposed rights), if such owner, not being prevented by fraud or concealment, stands by for a long period of time whilst those in possession are working the mines, this court will not lend him any assistance. Whatever remedy he may have at law, he can have none here, because it is not equitable to allow him to wait till it is ascertained that the persons in possession have succeeded or may have been ruined, and if the subject result in profit, to ask to put that in his pocket, if in loss, to repudiate the loss. It is not necessary, even if possible, to prove whether he acted from premed-

itated design or carelessness. These observations apply not only to mines, but have a far wider range, and extend to every kind of trade; and not only so, but to every ordinary case, though not perhaps with such force. It would be waste of time to indicate, by citing cases, the reasonableness of this proposition to show how continually it is acted upon by the court; but I will now state the reasons for my conclusions.

First, there is the extent or degree of laches; and, secondly, whether the plaintiff or Gwyn, from whom he claimed, was aware of the right sought to be established. Although the plaintiff did not acquire the estate till 1855, the delay for which he is responsible is not limited to the five or six years before the bill was filed. When he purchased, in May, 1855, he purchased the right to the rents; and again, in September, he took a conveyance of the fee; but he also took Gwyn's interest with the burthen of Gwyn's delay and added his own. As the plaintiff in the suit he can stand in no better position than Gwyn, if he had never parted with his interest. If Gwyn would have been disentitled to relief, so is the plaintiff, although at that time unacquainted with the fact. But it appears that he was as well acquainted with the facts as Gwyn was. How then must the time be computed? The Countess died in December, 1840, and from that time Gwyn's right to insist on the validity of the lease commenced; but he was an infant, and so far, therefore, time could not weigh against him or the plaintiff. Gwyn came of age on the 9th of February, 1846, when he received the accumulated income and half a year's rent from Martin, and from that day the time must be computed. No bill was filed till the 21st of December, 1860 (fifteen years within a little). But this court has repeatedly refused relief on the ground of delay for a far shorter period; and therefore as to the question of extent or degree, the case clearly comes within the principles of this court on the subject.

The next question, is, how far Gwyn was cognizant of his rights? As to what it is material to distinguish the grounds of relief. As to the power under the will, that is a mere question of construction on the will, as there is no other instrument having any bearing on that under which Gwyn derived his title, and of the contents of which he was aware;

and as to the lease being void, the lease and the will were the only materials, and Gwyn and his agents were well aware of them, as appears by his acts since he came of age. The allegations in the bill that he was not cognizant of these things are in the most general terms, namely, that he was on service and never able to discover the history of the lease, etc., but admitting, in fact, that he knew its terms. As to the alleged fraud, the question is, whether Gwyn was informed of that; and the answer is, that on the 10th of March, 1848, a letter was sent to Mrs. Powell, Gwyn's mother, which contained another document conclusively showing that at that time Gwyn knew of the circumstances alleged to constitute the fraud. It makes no difference on that question who was the person sending those documents; but it was no other than the plaintiff, who, from the time Gwyn attained twenty-one, was assisting to get rid of the lease; and it is clear that Gwyn was aware of the grounds on which it was alleged that the lease was void. It might be sufficient for me to stop here and say that the plaintiff is not entitled to relief; but the subsequent acts of Gwyn and his agents make the justice of that conclusion still more clear. There were communications and threats of proceedings in 1847 and 1848; and from that time for full six years, not only were no proceedings taken, but no communication passed on the subject; and it might have been thought that he had abandoned the claim, but that he never asked for rent. In January, 1854, an agent of Gwyn wrote to the solicitors of the defendants for an account of the coal under what he called the alleged lease, without prejudice to any question between the parties in any future litigation, either at law or in equity; and three months after the defendants were served with a notice from Gwyn to quit, with a schedule annexed, being a verbatim copy of the parcels in the lease. Gwyn, therefore, treated Vivian and Williams as tenants, conscious, perhaps, that the receipt of rent might have created a tenancy from year to year; and he recognized them as liable and rightly in possession as yearly tenants. Suppose the plaintiff to be otherwise entitled to an account, how can he insist upon one in the face of that notice? On a question of laches mere notice of claim can not stand in the place of proceedings. It only makes the delay more glaring. Laches is

not only absolutely doing nothing, but simply neglect to take proceedings; and it appears to me that no case ever occurred in which the principles of this court, with regard to laches, were more peculiarly applicable than to the present. The lease alleged to be invalid was granted in 1840; the subject matter was mines, continuously worked by those claiming under the claimant's title (the plaintiff and Gwyn standing in the same position); Gwyn, in 1846, coming of age, and well knowing what his claims were, and the grounds on which they rested; all the materials in his own possession; no concealment or fraud to prevent his asserting them; and not having either the excuse of poverty or the want of experienced legal advisers.

But here let us pause for a moment and ask, Who was the plaintiff and who were the defendants? The plaintiff from the beginning was Gwyn's agent, and in 1855 bought up this already sufficiently stale demand, and added to its staleness by himself waiting five or six years more. He then comes to this court to assert his rights, but not until Gwyn, Vivian and Williams are all dead. The defendants are not the persons alleged to have committed the fraud, but the representatives of those who, not being parties to or cognizant of such alleged fraud, purchased the lease, and during their lives continuously worked the mines at their own risk, as have the defendants since their deaths.

The matter might rest here, but one defense as to the fraud ought not to be passed over, viz., that Vivian and Williams were purchasers for valuable consideration without notice. That defense must be sustained. It is true that Vivian and Williams did not acquire the legal estate; but it has been decided that such a plea is good as to an equitable estate. Being clearly of opinion, however, that on the ground of laches the plaintiff is debarred, it is unnecessary for me to go further in this part of the case.

As to the last part of the prayer, that if the court should think the lease valid there should be an account, the fact is that an account was never refused, and has always been rendered whenever applied for; in fact it was provided for by the lease. The mode of asking relief is anomalous; but I am not prepared to say that in no case would the court give it on

a bill so framed. But it ought not to be given here for two reasons—first, it is asked on the assumption that the court would decide the lease to be valid, when it has decided nothing with respect to it, except that even if invalid, relief would be refused on the ground of laches; and secondly, that to grant it would be a great oppression upon the defendants, there being a mass of pleadings and evidence, a very small portion of which has any relation to a mere account under the lease. There are 45 printed pages of bill, 100 of answers, and 300 of evidence; nine tenths being exclusive of the question of the validity of the lease. If the plaintiff thinks fit to file a bill for an account on the footing of the lease, I will not preclude him; but I express no opinion on the point, except that he can not have the account now. On the whole the bill must be dismissed, with costs; but without prejudice to any proceedings at law which the plaintiff may be advised to take, or any bill on the footing of the validity of the lease.

RIGNEY V. SMALL ET AL.

(60 Illinois, 416. Supreme Court, 1871.)

¹ **Irregular foreclosure cured by delay of debtor.** Where a party gave a mortgage to secure several notes, and the assignee owning the whole indebtedness sued on a portion of them, obtained judgment and sold the land, which was not redeemed, and the party obtaining the sheriff's deed had entered upon the land and opened a coal mine: *Held*, upon bill filed by a grantee of the mortgagor to redeem nine years after the sale, that the sale was a foreclosure, and that the great length of time before an effort to redeem was made, waived any irregularity in the sheriff's sale.

Irregularities on execution sale, waived by delay. A sale made at four o'clock in the forenoon does not conform to the statute and renders the sale voidable, and so also does a sale of property *en masse* where it was susceptible of division; but by unreasonable delay amounting to laches the debtor loses the right to have the sale set aside.

Increased value. A party can not lie by and await the increase in value of property by mining, and then assert his rights as against a sale merely voidable.

Writ of error to the Circuit Court of Will County; the Hon. Josiah McRoberts, Judge, presiding.

¹ *Kreutz v. McKnight*, 6 M. R. 314.

Messrs. BROADWELL & SPRINGER, for the plaintiff in error.

Mr. G. D. A. PARKS and Mr. S. W. MUNN, for the defendants in error.

Mr. Justice WALKER delivered the opinion of the court.

This was a bill in equity filed by plaintiff in error, in the Will Circuit Court, against defendants in error. The bill alleges that complainant, on the 10th day of April, 1868, recovered a judgment in the Grundy Circuit Court, against Kéeffe, for the sum of \$1,850 and costs of suit, and an execution was issued thereon to the sheriff of Will county, who levied the same on the southwest quarter of section 5, township 32, north, range 19, east, third meridian, in Will county. The bill alleges that Kéeffe has no other property out of which to satisfy the execution.

It is alleged that, in September, 1856, one Philander Morton and his wife conveyed the land to Kéeffe, who, to secure the purchase money therefor, executed a mortgage thereon to Morton for the sum of \$2,220; that Morton assigned the mortgage to Henry Fish, and that the same had passed by successive assignments to Small, who became the equitable owner of the mortgage and indebtedness; that Fish, whilst he owned the mortgage and notes, sued upon one or more of them and recovered judgment for \$103.78 and costs against Kéeffe, sued out execution, and had the land in controversy sold thereunder as the property of Kéeffe; that the property was purchased at the sale by George W. Morton, who had become the assignee of the judgment, and a certificate of sale was filed in the recorder's office showing the sale was made on the 25th of September, 1858. The land not having been redeemed on the 9th day of July, 1865, the sheriff of Will county executed a deed to Small reciting successive assignments of the certificate of purchase from Fish to him. The bill in general terms and without stating facts, charged the judgment to have been fraudulently obtained, the execution, levy, advertisement and sale, irregular, and charges notice thereof to G. W. Morton, who by the sale intended to defraud Kéeffe out of his homestead.

The bill charges that the property was susceptible of division, and that either forty acres of the quarter was sufficient in value to have satisfied the execution in favor of Fish; that the quarter was worth about \$3,000; that the sale was made at a time unauthorized by law, and that it was for an inadequate price; that about the time the sale occurred Keeffe left the farm and went to Iowa to perform a contract for labor on a railroad, to earn the money necessary to redeem the premises from the sheriff's sale; that he had given to G. W. Morton a chattel mortgage on a large amount of property, which, if it had been properly managed, would have been sufficient to have paid the remaining unpaid purchase money on the land, but was fraudulently converted to his own use by Morton. The bill charges that if the judgment, execution, sale and sheriff's deed are regular, still Small only holds as mortgagee, and that Keeffe or his assigns have a right to redeem; that Small had opened a valuable coal mine on the land since he received his deed and has gone into possession.

The bill further charges that Keeffe was embarrassed; that he took a contract on a railroad to earn the money to redeem the land, and had obtained the amount necessary, but through misfortune lost it all and became penniless, and in that condition got to some place in the State of Missouri, when the troubles in the country broke out, and he was until they ended unable to return to redeem or to protect his rights in the premises; that, after his return, he being unable to redeem, and being indebted to plaintiff in error, he and his wife on the 13th of August, 1867, conveyed the premises to plaintiff in error by a quitclaim deed, to aid him in collecting his debt from Keeffe; that the plaintiff in error thereupon recovered judgment against Keeffe, sued out execution and had the levy made.

Complainant prays that the deed to Small be set aside and he be deemed a mortgagee, and that the mortgage be decreed satisfied out of the rents and profits received by Small before Keeffe conveyed to complainant, and that he pay to complainant the rents and profits since that date; and that complainant's title be decreed paramount; and that the judgment, execution, sale, mortgage and deed, to Small, be removed as a cloud, and that possession be decreed to complainant.

To this bill a demurrer was filed which was sustained by the court, and the bill dismissed at the September term, 1870. The record is brought to this court and errors are assigned thereon, questioning the correctness of the decree.

It is urged that the bill charges the judgment, execution and sale, were fraudulent, and the exhibits are referred to as showing in what the fraud consisted. On examining the execution levy and return of the officer we can perceive nothing irregular or fraudulent in them. They all seem to conform to the statute. On examining the certificate of purchase we find that it recites that the sale was made by the sheriff on the 25th day of September, 1858, at four o'clock in the forenoon. If the sale was made at that hour of the day it was contrary to the statute, and that formed ground for setting aside the sale and awarding an alias execution. The statute has declared that all such sales shall be made "between the hours of nine in the morning and the setting of the sun of the same day." And the same section, after prescribing all the regulations for the sale, and for a punishment of the officer for disregarding them, provides that no such offense or any irregularity on the part of the sheriff shall affect the validity of the sale unless it be made to appear the purchaser had notice of the irregularity.

This, then, would have cured all defects, unless it be the time of the sale, and there is not the slightest pretense that Small had notice of any other. And under these provisions it is apparent that such irregularity does not render the sale void, but only voidable. Until the notice is brought home to the purchaser, the law presumes the sale valid and effectual. And there can be no question that all objections to a voidable sale may be waived. Thus it has been held in such cases, that a party to avoid a sale must proceed to do so in a reasonable time. Laches, in such cases, will bar the party of equitable relief. In this case the defendant in execution must have known of the sale and satisfaction of the judgment against him, and he will be presumed to have known of this defect if one existed in fact. The probability is strong that the sale was made as required by the statute, and a mistake occurred in filling a blank certificate, as the sheriff is presumed to have understood the requirements of the statute;

and had he designed to aid in defrauding the defendant, he would have, in all probability, made his certificate in due form. Nor does the bill charge that the sale was made at the hour named. It was only ground for setting aside the sale if other rights had not intervened, reviving the judgment and awarding an alias execution against him. Knowing this he slumbered on his rights, neither moving the court to set aside the sale before the redemption expired, nor by doing any other act for nearly nine years, and then he merely releases his claim to plaintiff in error, and no suit is brought until in May, 1869, more than ten years and a half after the sale was made.

Here is a case where the parties have acquiesced in a judicial sale for a greater period than would have formed a bar, with the performance of the other requirements of the statute, to a suit in ejectment, under at least two limitation laws of the State. The defendant by his indifference and non-action treating the sale as valid, and apparently accepting the credit given him by the sale for so many years, must have been satisfied with the result of the proceeding. He never offered to restore plaintiff in execution to his rights by doing any acts until, by the growth of the country, the property has no doubt greatly appreciated, and large sums, we may infer, have been expended upon the land, as the bill alleges a coal mine has been opened by Small which has rendered large profits. To permit Keffe to lie by and be governed entirely by circumstances for nine years, whether he would treat the sale as a satisfaction of his debt, or would declare the sale voidable and recover the property, would be highly inequitable and devoid of justice. He should, if he desired to avoid the sale, have acted in a reasonable time and before innocent persons had acquired rights; and having failed to do so, he must be held to have waived all irregularities and to have ratified the sale.

The sale *en masse* is but an irregularity. If there was such an irregularity in this case it was merely ground for having the sale set aside. It did not render it void, but only voidable, and all we have said in reference to the time of sale applies for the same reasons to this objection; and the assignee of Keffe can not occupy a better position than his

assignor, as he took the property precisely as Keffe held it. Small had a right to suppose, after such a length of time, that Keffe had elected to ratify the sale and claim that the judgment against him was satisfied, and having purchased under such circumstances it is but reasonable and just that he be protected in the purchase.

There was, therefore, no error in dismissing the bill in the court below, and the decree is affirmed.

Decree affirmed.

WATTS' APPEAL.

(78 Pennsylvania State, 370. Supreme Court, 1875.)

Waiver of technical exceptions. If technical exceptions be not brought to the notice of the court in a formal manner and at a proper time, it will be presumed that the party elects to proceed on the merits.

Action by shareholders against directors. Where mismanagement by directors of a corporation is so gross as to amount to fraud, a bill may be maintained against them personally by a shareholder. A shareholder, may, under proper circumstances, interpose for the protection of the corporation.

Directors not liable for mistake in exercise of discretion. The directors of a corporation for the sale of land rejected offers for the purchase of its land; although this was imprudently done, yet being a matter resting in their discretion, if without fraud, they were not responsible. When directors act honestly for what they esteem the best interests of the corporation, and do not wilfully pervert their powers, but only misjudge them, they will not be held to account for money expended in such case.

Essential powers of corporation. The power to execute and issue bonds, contracts and other certificates of indebtedness, belongs to all corporations, public and private, and is inseparable from their existence.

Implied powers. The power to contract necessarily involves the power to create a debt. The charter of a land company gave the directors power to dispose of its land by deed or lease; the power to mortgage land on a proper occasion and for a proper debt is implied.

Incidental powers. The corporation owning a very large body of lands, had power by their charter "to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country." Held, that the building of saw mills and an hotel for the accommodation of those having business in connection with carrying out the prime object of the corporation, was within its powers.

¹ *Mining Co. v. Anglo Cal. Bank*, 104 U. S. 192.

Ultra vires affected by laches. Even if such expenditures were *ultra vires*, stockholders knowing of them and not objecting until long after their completion, could not compel the directors to account for the moneys expended.

Assent of stockholder presumed. When an act of directors is in excess of their authority, but done with a *bona fide* intent of benefiting the corporation, and a shareholder, knowing of it, does not dissent within a reasonable time, his assent will be presumed, and he can not gainsay it.

¹Protest not enough, without suit. When the act of the directors complained of is to be followed by a large expenditure, the shareholder should not only make his protest within a reasonable time, but should follow it up by active preventive measures.

²Laches operates as a bar. It is against good conscience that one having power to prevent should stand by and see his associates spend money which may result to his benefit, and afterward charge them with it. His neglect to act at the proper time effectually bars his right.

Statute of Limitations. Even if the directors were held to the liabilities of a trust relationship, six years would bar an action for misuse of the corporate property.

Corporate bonds are cash to the corporation. The stockholders directed public sales of their lands, and that payment might be made in cash and in their bonds: *Held*, the payment in bonds was equivalent to cash.

Purchase by directors at public sale. Directors bought at the sales at fair prices, and the sales were conducted openly and fairly. *Held*, the sales to them were valid.

June 2, 1875. At Harrisburg. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON and WOODWARD, J. J.

Appeal from *Nisi Prius*. In Equity. No. 2, to July term, 1870.

The bill in this case was filed by Henry M. Watts, John M. Bickel, Lewis Seal, Charles E. Anspach and James Auspach, plaintiffs, against The McKean and Elk Land and Improvement Company, John C. Cresson, William Biddle, Frederick Fraley, Samuel Mason, Mordecai L. Dawson, John Livezey, Samuel Welsh, James R. Greeves, Frederick Collins, William Hacker, Charles H. Hutchinson, Harry G. Clay, William Welsh, Robert P. Kane, The Pennsylvania Company for Insurance on Lives, etc., the executor, etc., of I. P. Hutchinson, deceased, the executrix, etc., of S. M. Leiper, deceased, the executors, etc., of Jeremiah Hacker, deceased, S. Mason and E.

¹ *Clegg v. Edmondson*, 8 M. R. 180.

² *Pratt v. California Co.*, 1 W. C. R. 87.

F. Gay, trustees of McKean and Elk Land and Improvement Company under a first mortgage, C. H. Hutchinson and H. G. Clay, trustees of same company under a second mortgage, The New York and Erie Mining Company and The Erie Mining Company.

On the 6th of February, 1856, an act was passed to incorporate The McKean and Elk Land and Improvement Company. It recited that Samuel M. Leiper died seized of an undivided fourth of land in the counties of Elk and McKean, etc.; that the other owners were desirous of converting their interests into the stock of a corporation, established by the act; that the interests of the widow and children would be injured by a sale of the lands by proceedings in partition which were threatened by the other owners, and that the executors of Leiper had no authority to convey the land to such corporation and receive as the other owners were about to do, payment in stock of the corporation; it was enacted:

Sect. 1. That the executors, etc., of Leiper, might sell and convey to the corporation the interest of Leiper in the lands and receive its stock in payment.

Sect. 2. That Henry M. Watts, John K. Kane, Frederick Fraley, John C. Cresson, Samuel Mason, John Livezey, Joseph Cresson, Jeremiah Hacker, Mordecai L. Dawson, Samuel Welsh, James R. Greeves, I. P. Hutchinson, William Biddle, Thomas Struthers, and the executors of Leiper, their associates, successors and assigns, should be a corporation under the name of The McKean and Elk Land and Improvement Company, with all the privileges, etc., of a corporation.

Sect. 3. The corporators above named should, as soon as convenient, elect seven directors, to serve for one year; each share of stock to entitle the holder to a vote; the directors to choose one of their number for president, and other officers might be elected and appointed; the governor to issue letters patent on notice of the organization of the corporation.

Sect. 4. The corporation to value their lands and convert them into a common stock; to be divided into a convenient number of shares, which were to be apportioned amongst the owners of the lands according to their interests respectively, for which shares certificates should be issued.

Sect. 5. The directors to sell the land and receive "any

moneys, mortgages or other securities, including the certificates of stock of this corporation, in payment, * * * provided that the said corporation shall sell and dispose of at least one half of all their land within ten years, and the remainder, except 2,000 acres, within twenty years from the date hereof.

Sect. 6. The corporation to have power to lease for a period not exceeding twenty years, any of the lands and the right, etc., of mining and carrying away iron ore, coal and other minerals and materials from the land, and "to aid in the development of the minerals and other materials, the use and transportation of them to market, and promote the clearing and settlement of the country; * * * to employ their capital in the construction of such railways, not exceeding twenty miles in length, as may be necessary from such mines to intersect the Sunbury and Erie or the Allegheny Valley Railroad; * * * to create a capital stock of \$100,000, for the purposes specified in this section."

Sect. 7. Dividends from the sales of lands, etc., to be made amongst the shareholders at least once a year, "and when the proceeds of the sale of lands are paid to the holders of certificates of stock, such certificates shall be surrendered to the corporation and canceled, and new certificates issued according to a uniform rule of equitable adjustment of the rights of shareholders, * * * so that whenever the whole of the lands shall have been sold the certificates representing the same shall have been entirely exhausted and canceled."

On the 14th of April, 1864, a supplement to the foregoing act extended the time for selling the lands of the company five years.

Another supplement, passed March 16, 1867, authorized the company to borrow money for purposes of improving and developing their lands, and for all other purposes of the corporation, at such rate of interest as they might deem advisable, or by sale of the bonds at a discount, and secure the payment of the money borrowed by mortgage or mortgages on their estate.

A supplement was passed February 10, 1852, to the act to incorporate the Sunbury and Erie Railroad Company (passed April 3, 1837). It authorized municipal or other corpora-

tions to subscribe for the stock of the Sunbury and Erie Railroad Company, and to borrow money to pay therefor; the bonds that might be issued by such corporations bearing interest at six per cent. per annum might be received by the railroad company as cash in payment of the subscriptions for stock, etc.

The bill set out:

1. That H. M. Watts, July 1, 1855, was owner of one fourth, Leiper's representatives one fourth, Fraley, Cresson, Hacker, Greeves, Biddle and Hutchinson's estate were owners of the other half of land in McKean and Elk counties, comprising between 120,000 and 150,000 acres; and the act (above stated) to incorporate the McKean and Elk Land and Improvement Company.

2-9. Set out the provisions of the act, its acceptance, issue of letters patent, etc.

10, 11. Conveyance of the land to the corporation, and its conversion into stock; 108,000 shares issued to the owners of the land, and 12,000 shares reserved for incidental expenses.

12. That plaintiffs held more than 30,000 shares of the stock; and charging the directors with neglect of duty, malfeasance in office and perverting the purposes of the corporation.

13. That the directors neglected to sell the land as required by the act of incorporation, viz., one half in ten years, and the remainder in twenty years, and make dividends of the proceeds at least once a year.

14. Subscribing without authority of law for 1,625 shares of the stock of the Sunbury and Erie Railroad Company, to be paid for, \$100,000 in cash and 5,000 acres of land, Watts, who was president, voting against the subscription and resigning.

15, 16. Watts' various protests and efforts to withdraw his land.

17. Assessment of 60 cents per share on the stock.

18. The unlawful execution of a mortgage, February 1, 1863, for \$200,000 to Mason and Gay, trustees.

19, 34. Selling and conveying land to the Erie Mining Company, and the New York and Erie Mining Company in 1865, and accepting 11,750 shares of the stock of those companies in payment.

20, 21. Unlawfully executing a mortgage, June 22, 1867, for \$267,000, to C. H. Hutchinson and Harry C. Clay, as trustees; the bonds secured by both mortgages taken by the directors, who were makers, sellers and purchasers.

22. Sale in 1857 of 9,000 acres of land for \$51,654.

23-25, 32. In 1868 the directors proposed to sell 98,795 acres and sold 35,600 acres at various prices, 62 per cent. payable in stock, 36 per cent. in mortgage bonds, and 2 per cent. in cash; the 35,600 acres were part of 98,600 acres estimated by a committee of the directors at \$2,254,788; the sales were to shareholders, creditors and directors, on terms prescribed by themselves, and would exceed \$400,000.

26, 27. Since November, 1859, Watts had been persistent in his efforts, by written and verbal communication, to withdraw his land or purchase it; and the refusal of the directors to sell to one Putnam, who proposed to purchase 15,000 acres at \$25 per acre.

28. The directors, by accepting conveyances of the land from the owners, assumed all the duties imposed by the charter, which they have neglected and refused to perform, etc.

30, 33. The directors, without authority of law, had contracted debts, and engaged in the erection of saw mills, hotels and other buildings, and had misappropriated the funds instead of dividing them amongst the shareholders.

31. The directors mortgaged the lands so that they necessarily became purchasers of the bonds secured by the mortgages; on the 20th of February, 1870, they threatened to foreclose the mortgages if the stockholders did not raise money to pay taxes.

The relief prayed for was for a decree:

That the two mortgages were void, and not a lien; that the sales to the two mining companies be set aside, or if valid that the directors individually pay the plaintiffs their proportion of \$117,500, the value at which they estimated the shares of these companies' stock; that the subscription to the Sunbury and Erie Railroad stock was without authority of law, and the directors pay the plaintiffs the damages they may have suffered by it; that an account be taken, and defendants pay, etc.; that the land to which plaintiffs may be entitled be conveyed

to them clear of incumbrance; or, if that can not be done, that the directors individually pay the plaintiffs the value for each acre they should not be able to convey; that the sale of the 35,600 acres was without authority and void, or that the directors pay plaintiffs their proportion of their value; that they pay the taxes; and an injunction restraining a sale by the trustees under the mortgages; there was also a prayer for general relief.

The answer of the McKean and Elk Land and Improvement Company denied the allegations of the 12th paragraph of the bill; denied the charges in the 13th paragraph, and averred that they had done all in their power to effect a sale of the land; the land was inaccessible, except in the neighborhood of the Sunbury and Erie Railroad; the completion of this road had been delayed for nearly nine years; outlays were required for roads, etc., without funds to make them; all the large shareholders, except Mr. Watts, were willing to contribute; there was always an agent residing in the neighborhood to make sales; whilst Mr. Watts was president, the price of farm land had been fixed at \$5 per acre, but under the direction of the defendants, in January, 1861, the price was fixed at \$2 per acre without obtaining purchasers; no sales of any magnitude had been made during Mr. Watts' presidency, nor had he, although often requested, suggested any plan for effecting sales. Denied recollection of allegation in 27th paragraph, that Putnam offered to purchase land at \$25 per acre; demanded proof of it and of his ability to pay. Admitted the subscription to the Sunbury and Erie Railroad stock. They averred that the importance of the railroad as an outlet to the lands, even at a large outlay, was appreciated from the beginning and recognized by Mr. Watts in drafting the charter. In 1858 a committee, of which he was one, reported that a fair price could not be obtained without such outlet. The act of February 10, 1852, conferred authority to make the subscription; a committee was appointed to negotiate with the railroad company, the effort being to save the construction of a connecting road by securing a change of route, and obtaining a route which was contiguous to and traversed the lands for many miles; authority from the stockholders to make subscription, of which \$91,000 of first mortgage bonds were agreed to be taken

There was a failure to make any arrangement with Mr. Watts because of his unreasonable demands, and because he claimed an allowance for the charter and to be free from any responsibility to the Sunbury and Erie company, and that he asked warrants along the line of the railroad.

There was a large indebtedness for taxes, surveys, etc.; the shareholders, who had previously assisted, declined to contribute further on account of Mr. Watts' persistent refusal to aid or permit the lands to be sold at public sale, or to raise funds, and his dissent from any assessment on the shareholders to pay the liabilities, and interposing difficulties to raising money from sale of lands, and warning the company not to permit them to be sold for taxes. The stockholders, on the 16th of May, 1862, authorized the first mortgage to pay the then present indebtedness and the subscription to the railroad; \$91,000 of the mortgage bonds were appropriated to pay the subscription and remainder to legitimate indebtedness; none of the proceeds of the mortgage were converted to the private use of the directors or misapplied. The second mortgage was made with the approval of the stockholders, under the act of March 16, 1867. Watts admitted the propriety of investing funds for improvements, and that the act of 1867 removed most of his objections to the carrying on of improvements, etc., by the corporation. The bonds were not chiefly taken by the directors; opportunity was offered to Watts to subscribe; he agreed to subscribe to a working capital, and withdrew his subscription because, as he alleged, it had been made with the understanding that he was to be president.

At a stockholders' meeting in February, 1868, a plan for the division of the land amongst them was recommended, which was referred to a committee for conference with the directors; there were other meetings for the same purpose, and on May 29, 1868, a public sale was authorized, should the plan of division fail; it did fail, and there was a public sale October 20, 1868.

There were throughout the answer denials of neglect of duty and of misapplication or misappropriation of the funds.

Separate answers of the other defendants were filed, denying, amongst other things, misappropriation of the funds and neglect of duty. Some of these denied any connection with any of the matters charged.

Replications were filed, and an examiner appointed, who took and reported a great mass of testimony. William J. Price, Esq., was appointed master. He reported elaborately and at great length. He found the following facts:

At a meeting of the directors they resolved that the shares of stock to be issued should be equal to the number of acres, and then should not exceed 108,000 shares, each share to represent one acre, and to be estimated at \$50 till otherwise ordered; the shares reserved were 12,000, and were to abide the future action of the company. The directors acted with great promptitude to carry on the primary objects of the corporation. The lands were of great value for timber, coal and iron, and also for agricultural purposes, but it was an almost unbroken wilderness, and away from public highways, so that their resources could not be made available. The Sunbury and Erie Railroad and the Allegheny Valley Railroad were looked to as soon to furnish outlets to market. The leading object of the company was to sell the lands and divide the proceeds amongst the stockholders. All the directors labored earnestly to interest capitalists and make sales of the lands. In May, 1858, a committee of the directors was appointed to endeavor to effect sales of the lands and stock, and ascertain if anything could be done to aid in procuring an outlet to market. In September the committee reported, that obtaining a fair price for their lands could not be accomplished until there was an outlet for their mineral product, and that which seemed likely to benefit them first was the western portion of the Sunbury and Erie Railroad; this railroad (afterward the Philadelphia and Erie Railroad) was not opened till seven years after the report; its first train went through in October, 1865. This delay prevented sales of lands and there were no dividends; but the accumulation of taxes and the necessary expenses were large and to be provided for. In 1859 the company subscribed for \$162,500 of the stock of the railroad company, in order to secure a railroad through their lands; the subscription was paid in 1863, by \$91,000 of the mortgage bonds mentioned in the bill, 4,800 of the reserved 12,000 shares of stock, and 200 acres of land. The first mortgage was issued February 1, 1863, to Samuel Mason and Edward F. Gay, as trustees; the bonds secured by it amounted to \$200,000, and

were to meet the subscription to the railroad stock and other liabilities. During the oil excitement in 1864, 1865, a lease was made to an oil company of some of the company's lands supposed to contain oil. This enterprise failed; while the excitement continued, the stock of the Land and Improvement Company was sought after and sold at increased prices; some was sold at \$20 per share, but upon the failure of the efforts for oil its value decreased; Lewis Seal, one of the plaintiffs, bought 800 shares for \$1 per share.

In September, 1866, the stockholders authorized the directors to raise by loan \$200,000 to meet liabilities accrued, and provide means to meet future liabilities, and to issue bonds to be secured by a second mortgage. Mr. Watts denied the power of the company to raise funds in that way; the act of March 16, 1867, *supra*, was passed to confer the power. A second mortgage and bonds were executed June 22, 1867, Charles H. Hutchinson and Harry C. Clay being the trustees.

The master found that the failure to sell more land within the time limited by the charter could not be attributed to the neglect of the directors or to a disregard of the provisions of the charter. The long delay in the opening of the Philadelphia and Erie Railroad contributed in a large measure to the disappointment of the objects and calculations of the original owners of the land.

"In this condition of things, the successive boards of directors were obliged to assume a difficult and at times a delicate management; but they appear to have communicated frequently with the other stockholders, and to have conducted their management under the counsel and with the approval of a large majority of them. In the opinion of the master, the evidence fully justifies the conclusion that the successive boards of directors proceeded from time to time in such manner as they honestly believed to be for the best interests of all the stockholders."

As to the subscription to the Sunbury and Erie Railroad,
* * * "The railroad company being without means to complete the undertaking, those who were supposed to be benefited by the road were called upon to contribute to its construction. The location of the road at some points was made dependent upon the manner in which such calls were

responded to. * * * The railroad would not have touched the land of the McKean and Elk company at all, if the subscription had not been made; but that it would have been laid at least ten miles away. With the subscription, however, the road was laid about fourteen miles through the company's land, and added considerably to its value.

"The following facts show what action was had in the McKean and Elk company, in relation to the subscription complained of, so far as it appears in the evidence. The attention of the board of directors was called to the subject by Mr. Fraley, in August, 1857. The directors' minutes, under date of December 14, 1857, show that the president laid before the board a programme for a basis of land operations between the McKean and Elk company and the Sunbury and Erie Railroad Company, which was referred to a committee of three stockholders—John C. Cresson, John K. Kane and Henry M. Watts—to report at a future meeting. On December 26, 1857, that committee presented a communication to the board, which was considered; and it was agreed that the company would negotiate with the Sunbury and Erie Railroad Company for 15,000 acres of land, at six dollars per acre, to be paid for in the stock of the railroad company at par. That transaction does not appear to have been consummated as proposed; but at a meeting of directors, held on the 5th day of May, 1859, called for the purpose of considering the subject of subscribing to the stock of the Sunbury and Erie Railroad Company, a committee of three—Henry M. Watts, Frederick Fraley and James R. Greeves—was appointed, with authority to make a subscription of \$100,000, conditioned on the adoption of the route by the West Clarion and Two-mile-run, the subscription not to be payable until the road was completed. The subscription appears to have been made on the 14th day of June, 1859, payable in 5,000 acres of land at \$12.50 per acre, and \$100,000 in cash upon completion of the road. It appears also to have been made by the directors for and in the name of the McKean and Elk company. The directors at that time were Henry M. Watts—who was also president of the company—John C. Cresson, Samuel Mason, Mordecai L. Dawson, Frederick Fraley, James R. Greeves and Robert P. Kane. Mr. Watts resigned as

president and director on the 12th day of November, 1859. The subscription thus made by the directors for the company was ratified by the stockholders. The answer of the McKean and Elk company in this case supported by the minutes of a stockholders' meeting held May 16, 1862, shows that the act of the directors was adopted, and that they were authorized by the stockholders to borrow \$200,000, to pay, among other things, the subscription to the Sunbury and Erie Railroad Company, and to issue bonds of the McKean and Elk company, secured by a mortgage of its lands for repayment of the money so borrowed.

"At a meeting of the directors of the McKean and Elk company, held March 13, 1863, Mr. Fraley, of the committee to subscribe, reported that the Philadelphia and Erie Railroad Company had agreed to settle the McKean and Elk company's subscription by receiving \$91,000 of six per cent. bonds of said company, 200 acres of land at or near the summit—to be selected by mutual agreement—and 4,800 shares of the reserved stock of the company, for which the McKean and Elk company was to receive \$162,500 of the stock of said railroad company at par. This proposition was accepted by the board of directors.

The master was of opinion that the company had power to make the subscription.

As to the first mortgage:

* * * "At the time of the creation of this mortgage, the taxes upon the lands of the company for the years 1860–61, amounting to \$11,600, were due and payable, and the lands were liable to be sold for the taxes. The company was without money, and stood indebted to stockholders for advancements to a considerable amount, to pay current expenses. It was indebted also for surveys and explorations of the lands, necessarily incurred in preparing them for sale, and as part of the efforts of the directors to induce purchases. The company was also under obligation to meet the subscription to the stock of the Sunbury and Erie Railroad Company. The efforts to raise money by sales of lands had proved abortive, as had also an attempt to obtain a loan by assessing the sum ratably upon the stockholders. In this condition of affairs, a stockholders' meeting was held on

the 16th of May, 1862, to consider and take action upon the financial condition of the company, at which meeting it was unanimously 'resolved that the directors be and they are hereby authorized to borrow the sum of \$200,000 for the purpose of paying off the present indebtedness of the company; for the payment of the subscription to the stock of the Philadelphia and Erie Railroad Company, and for such other purposes as the interests of the company may, in their judgment require, * * * and the repayment of the money so borrowed shall be secured by mortgage of the real estate of the company.'

"Therenpon the board of directors resolved to borrow the sum of \$200,000 in the name of the company, and to execute and issue bonds for the same, * * * and a mortgage of all the lands of the company to Samuel Mason and Edward F. Gay, in trust, to secure the payment of the principal and interest of the said bonds. * * * The bonds and mortgage were thus created by the company, and the proceedings of the directors therein were grounded upon the action of the stockholders as the source of authority for what they did. It is true that the charter of the company is silent upon the subject of borrowing money. It neither expressly authorizes nor forbids it; and it may be assumed that such a transaction was not contemplated when the charter was obtained. * * * A corporation has incidental authority, when not specially restricted, to borrow money for any of its lawful purposes, and when by its charter it is authorized to purchase in fee or for any less estate all such lands, tenements and hereditaments as shall be necessary and convenient in the prosecution of its works, and the same to sell and dispose of at their pleasure, it has power to mortgage its real estate to secure the payment of a debt. The master is of the opinion, therefore, that the said first mortgage, dated the first day of February, 1863, was not *ultra vires* and void as charged in the bill.

"The second mortgage stands upon a footing different from the first one, under the act of March 16, 1867, *supra*. * * *

"At a meeting of the stockholders, held the 18th day of September, 1866, the directors were authorized by resolution to raise by loan the sum of \$200,000, 'for the purpose of discharging the present and providing funds to meet future obli-

gations of the company.' * * * The bonds with six per cent. interest * * * to be secured by mortgage of the estate of the company. And the directors were authorized to sell the bonds at such time, at such rates and on such terms as they should deem best for the interests of the company. At a meeting of the directors, on the 24th of September, it was resolved that, agreeably to the said authority given by the stockholders, the sum of \$200,000 should be raised by a sale of six per cent. bonds of the company; * * * that the payment of the said bonds should be secured by a first mortgage on the lot of ground and buildings now erecting thereon for a hotel, and the lots of ground and buildings to be erected thereon by the company for dwelling and boarding-houses, situate in the town of Kane; and also by a second mortgage on the other estate of the company, said mortgage to be made to trustees, and to contain provisions for the release of the mortgaged premises, in the case of sale, on the payment to the trustees of the proceeds, of not less than one fourth of the purchase money, or of the securities received therefor. It was also resolved to offer the bonds to the stockholders at the rate of seventy-five cents on the dollar. The foregoing authorizations are recited in the mortgage. * * * The master is of the opinion that the mortgage is within the terms of the supplement to the charter of the company, already referred to at large, and therefore valid."

As to the sale of land to the mining companies, "There were certain portions of the lands of the McKean and Elk company interlaced with lands belonging to other parties, some of which latter Gen. Thomas L. Kane had purchased and obtained rights to purchase, and which were known to contain limestone and outcroppings of coal. On the 11th day of May, 1865, at a meeting of the directors of the McKean and Elk company—called to consider the propriety of placing a portion of the lands of the company lying in Johnson's Run Coal Basin in two coal companies about being formed, one to be called the Erie Mining Company, the other the New York and Erie Mining Company—Gen. Kane attended, and it was proposed to start these organizations with each about 300,000 acres of land, of which it was thought the McKean and Elk company could furnish nearly one half, the remain-

der to be furnished by the parties owning very valuable coal lands, adjoining lands of the McKean and Elk company. 'The board believing the interests of our stockholders would be promoted by these companies being organized, it was, on motion, resolved that the proposition be accepted on the terms to be agreed upon by the committee on real estate.'"

"On the 7th of November, 1865, it was resolved by the directors to make those sales to the two mining companies, and to receive in payment therefor, shares of the capital stock of those companies, and that one half the stock thus received in payment should be transferred and paid over to Samuel Mason and Edward F. Gay, trustees of the first mortgage, upon their executing proper releases of the land sold. The conveyances were subsequently made and the stock received. The entire stock of the mining companies was distributed to the McKean and Elk company, and to the private owners, in proportions corresponding with the lands contributed by them, respectively, to the companies. The lands conveyed to said mining companies were so interlaced with others, not belonging to the McKean and Elk company, as to be incapable of being worked to advantage, and were without outlet, isolated and practically valueless, unless incorporated with the other adjoining lands. This transaction is not charged in the bill to have been fraudulent or intentionally wrong; and the defendants claim, through the answer of the McKean and Elk company, that the transaction was a fair one, advantageous to that company, and that it was approved by the body of the stockholders. * * * The mining companies appear to have been formed at about the time the Philadelphia and Erie Railroad was opened for business, and were no doubt looked to as a means of developing the mineral lands which were conveyed to them, and of yielding to the McKean and Elk company a full share of the wealth which the lands were supposed to contain.

"It is apparent from the evidence that the transaction in question was explained to and approved by most of the stockholders of the McKean and Elk company, though the master does not find any evidence that Mr. Watts was present, or that he gave in his assent. Whether Charles E. Anspach was then a stockholder, does not clearly appear, though he became

one some time in the month of November, 1865. Neither of the other plaintiffs became stockholders until some time afterward. The plaintiffs have not proved a want of good faith on the part of the directors of the McKean and Elk company in the transaction, nor that the directors were, in any event, to acquire personal gain beyond that which might come to them as stockholders, and in common with all the others. It is quite possible, however, that there may have been an error of judgment about it, which has been rendered most apparent by subsequent experience; but if that be so, it was an error in which the body of the stockholders participated. * * * The stock of the mining companies was believed to be valuable when received in payment for the lands sold to those companies, with prospects of considerable increase in value at no distant day. The plaintiffs substantially affirm thus much in their bill, when they give the directors' estimate as to the stock. It was at that time certainly equivalent in value to the land conveyed by the company, or thereabouts, for the shares of stock had been apportioned according to the values of the lands which constituted the capital of the mining companies, and were issued to the respective vendors of the lands accordingly. If the stock thus taken has since depreciated in value, or even become worthless, without willful neglect or wrongful misconduct of the directors of the McKean and Elk company, yet those directors are not required by the charter of the company to become guarantors of the ultimate value of the securities which they are authorized to receive in payment for lands sold; nor are they individually liable for honest mistakes of judgment in relation to present or future value of the securities taken in payment.

"The master is not aware of any ground on which he would be justified in reporting either that the sale was made without authority of law, or that the directors, individually, should account and pay to the plaintiffs in respect of it.

"The lands of the mining companies were sold for taxes in June, 1870, and bought in at the treasurer's sale by Gen. Kane, under previous arrangement, which has since been put into the form of an agreement. By the terms of that agreement, Gen. Kane holds the lands which belonged to those companies before the treasurer's sale in trust for and to convey

them to said companies respectively. So that if those lands were part of the most valuable mineral lands of the McKean and Elk company, as averred in the bill, the stock of the mining companies held by the McKean and Elk company must still possess value." * * *

As to the public sales of land: "There are upward of thirty persons interested as purchasers under the sale of October, 1868, and those which followed it upon the same terms, who had paid for and taken conveyances of the land so purchased, according to the terms of sale, but who have not been made parties to the bill." * * *

"The opening of the Philadelphia railroad, whilst it had enhanced the value of the lands, had not caused them to be immediately salable. The only sale made for cash after its opening was to Jackson Shultz in August, 1867, for about 9,000 acres, at \$6 per acre, the minerals underlying being reserved; he established a large tannery, but would not have bought if the railroad had not been opened; it appeared that the other lands could not be sold in a reasonable time for prices satisfactory to the stockholders. On the 10th of February, 1868, the directors submitted to them a report, advocating a conversion of the stock and bonds into the land itself by such stockholders as might desire to do so; this was unanimously adopted. The land was immediately divided into suitable parcels, having regard to their character and value, and maps, etc., prepared, showing the location of each parcel and its position relatively to mineral, timber and other advantages; this preparation showed great labor and care. At a special meeting of the stockholders, May 12th, 1868, the plan was recommended by a committee of the directors, who made an elaborate report on the subject. The report was ordered to be printed and a copy sent to each stockholder; the meeting adjourned for two weeks. The report contained a valuation of the land which, after deducting an amount sufficient to pay the bonds, other liabilities, and leaving a cash balance, showed that, "the value of each share of stock or its purchasing power" would be \$20.44. The purchase money was to be payable in cash, or in the mortgage bonds of the company, and stock in the following proportions: 80 per cent. in stock, 7 per cent. in first mortgage bonds or

cash, 8 per cent. in second mortgage bonds or cash, and 5 per cent. in cash; any of the payments could be made in cash. At an adjourned meeting of the stockholders, May 29, 1868, the plan was approved, and they resolved that the directors be authorized to sell the lands to the stockholders, or any other persons who would buy on the conditions of the plan before the next July 15th; that the bondholders be requested to agree to release the lien of the mortgages on any lands sold on the terms mentioned in the resolution; that if the bondholders would not agree to release, or the whole of the lands should not be taken, the directors were authorized to sell the lands at public sale in Philadelphia on the third Tuesday of the next October, after notice by publications specified in the resolution and in such manner in addition as should be calculated to give full information. All the shareholders did not agree to the plan and the sale was held at the Philadelphia exchange on the 20th of October, 1868. The terms were cash, or 36 per cent. of the purchase might remain secured on the premises sold, payable in five annual installments; 62 per cent. in the company's stock at \$6 per share, and 2 per cent. cash to be paid when the land was struck off; any of the payments might be made in cash. Purchases were made by stockholders only and amounted to 28,000 acres for \$342,617, of which 2 per cent. was paid in cash and the remainder in the mortgage bonds of the company. On the 22d of October the directors authorized the president and treasurer to sell the remainder of the land, at the minimum price and on the terms proposed; 18,000 acres were sold to the stockholders, the prices aggregating about \$160,208.

"By this plan, while the purchasing power of the stock was reduced from \$20.44 to \$6 per share, the minimum prices of the lands offered for sale were reduced in corresponding proportion. It was believed that, by reducing the minimum prices to correspond as near as practicable with the prices at which similar lands near to or adjoining those of the McKean and Elk company had then recently been sold at private sales, persons who were not stockholders might be induced to purchase at this public sale. Tracts of land were sold at various prices, the average of which was about \$11.25 per acre. Purchasers paid the 2 per cent. in cash, surrendered their mort-

gage bonds and stock, and received conveyances from the company, discharged from the lien of the mortgages, and the mortgage debts and outstanding shares of stock were correspondingly reduced, before the bill in this case was filed.

* * * If it were conceded that the terms of sale were thus unequal—and to that extent unfair—would the concession justify either decree for which the plaintiffs have prayed in that behalf? It might have furnished a ground for setting the sales aside, or an injunction against the consummation of them, remedies which must be sought before the price was paid and deed of conveyance delivered; but it is difficult to see that the sales were for that reason void, and could be so decreed upon complaint made eighteen months afterward. The bill was not filed until April, 1870.

“As to a decree that the directors do individually pay to the plaintiffs their due proportion of the value of the lands sold, and that they pay the taxes assessed and due upon the land, that would really be but a decree for individual damages, which are not recoverable in equity. The directors appear to have acted in this affair, as in others already noticed, at the instance of and in conjunction with the stockholders, and within the chartered powers of the corporation. The master is unable, therefore, to recognize that the directors have incurred individual liability in respect of the sales complained of. * * *

“The master has been unable to find any proof that either of the plaintiffs offered or even desired to purchase any of the land at the October sales. Afterward, in May, 1869, Charles E. Anspach, signing for himself and others, agreed to take five of the remaining sections, on the terms of the sales in October, but he did not comply with his agreement. It would appear from all the evidence taken together, that whatever may be the intrinsic value of the lands, they brought a fair market value; and if any particular tract or tracts were sold at a sacrifice, the fact has not been established by proof. If the prices at which other lands in the same neighborhood were sold, or the price of that sold by the company to Jackson Shultz, or the market value of the stock of the company at that time—each share representing one acre at least—is taken as a criterion of value of the land sold in October, it

will be found in either case that the prices then obtained may well be regarded as fair market prices." * * *

The master then went into a calculation to show that the results of the sales did not produce injury to the plaintiffs.

"There is still the objection contained in Sec. 32 of the bill, that the directors became purchasers at the public sale in October, 1868, 'upon such terms and conditions as they themselves had prescribed.' The master is of the opinion, in view of the facts already stated, that the terms and conditions of the sale, and the sale itself, should rather be regarded as having been prescribed by the stockholders, and that the duties of the directors in relation to it were ministerial only."

As to the buildings: "It is claimed in the answer that the buildings complained of were erected for the purpose of stimulating sales of the lands, and that the work was done with the full knowledge and approval of the stockholders, in annual and special meetings assembled; that the hotel and buildings were erected at the town of Kane, under a promise of the Pennsylvania Railroad Company (lessees of the Philadelphia and Erie), to make that a stopping-place for their trains and the site of their machine and work shops, if they were finished in accordance with a certain plan; before that was done, there were no accommodations for persons visiting the lands; that they were authorized to be built in 1865, but not finished until 1868, being several times stopped for want of funds; and the stockholders were from time to time notified of the progress of the hotel, and appealed to for contributions of funds to complete it; that during the presidency of Mr Watts, the company became possessed of a saw mill. A new one was erected with a view to furnishing the timber for the hotel and buildings, and to showing the company's resources in timber, and thereby encouraging sales. * * * The real question, therefore, relates to the power of the McKean and Elk company to erect the buildings.

"The averments of the answer appear to be supported by the evidence in relation to the buildings, and the motives for erecting them. The contest has been chiefly carried on concerning the hotel, which appears to have cost about \$60,000. The cost of the other buildings does not appear in the evidence; and it is inferred, from what little has been said of the

dwelling-houses, that they were erected in part for the use of employes of the company, and at no great expense.

“If it is true that the company was authorized by its charter to erect a hotel upon its land, then the master would not report that it was injudicious to erect the one in question; for if it has drawn to the same immediate locality a railroad station, depot, work shops, and a machine shop, and formed the nucleus of the growing town of Kane—on the line of the Philadelphia and Erie Railroad—it can hardly be called an injudicious improvement to stimulate sales of the lands. And it has not been shown that stockholders have been injured by it, for the company still owns the hotel, and the evidence furnishes no reason to conclude that it is not worth all it cost.

“The directors acted in this matter under a belief that they were authorized by the charter, and still more directly by the supplement of March 16, 1867, to improve the property of the company in the manner they did. Such also appears to have been the opinion of the principal plaintiff in this case; for it is in proof that Mr. Watts, speaking of the said supplement to the charter, said to one or more of the directors, ‘This, gentlemen, is just what you want. You can do anything under this you please.’ Neither of the other plaintiffs was a stockholder when the work was undertaken. * *

* The master is of the opinion that the hotel was not such an improvement as the company was authorized to make. It has appeared to him that both Mr. Watts and the directors were mistaken—but fairly and honestly mistaken—in their construction of the power conferred by the supplement which authorized the borrowing of money ‘for the purpose of improving and developing the lands of the said company, and for all other purposes of said corporation;’ and that the phrase, ‘for all other purposes of said corporation,’ is referable to such purposes as were justifiable under the charter as it stood before the supplement was passed. * * *

“The master has been unable to find evidence of objection on the part of any stockholder other than Mr. Watts, prior to the institution of this suit, to either of the matters complained of in the bill. It is considered by the master that neither of the plaintiffs, except Mr. Watts, has shown that he has a status to contest the subscription to the Sunbury and Erie

Railroad, nor the first issue of bonds and the mortgage made to secure them; nor the erection of the hotel. They did not become stockholders until after the subscription had been made and settled for, and the bonds had been issued, and the hotel had been authorized and was in course of erection. The same may be said in regard to the sales of land to the Erie and to the New York and Erie Mining Companies which appear to have been authorized at a directors' meeting held on the 11th day of May, and the terms of sale concluded on the 5th day of November, 1865. Hence, the master considers that Mr. Watts is the only one of the plaintiffs who has shown a status to inquire into or contest either of those transactions. It may be important, then, as bearing upon the questions of laches and limitations—urged for the defendants—to know what was Mr. Watts' course of dealing with the several matters complained of prior to the commencement of this suit. The following facts are deduced from the evidence, as bearing upon this branch of the case."

The master then recapitulates the facts of Mr. Watts' dissatisfaction with the railroad subscription, with the mode proposed to raise money to pay, occurring ten years before filing the bill; that first mortgage bonds were issued seven years before filing the bill, Mr. Watts then asserting that the measure was not within the corporate powers of the company; that he knew that the other stockholders and directors differed from him and that they were managing the corporation in accordance with their own views; and that he knew of various other matters of which he complains in the bill, at times considerably anterior to filing the bill; that whilst protesting against many of those things of which he complained, he took no other steps to arrest them; that he saw and had knowledge of the improvements being made, and of many of the expenditures complained of, without making objections within a reasonable time, in some cases not until the institution of these proceedings.

"The master is of opinion that it was the duty of Mr. Watts—if he meant to contest the subscription to the Sunbury and Erie Railroad, or either of the issues of bonds, or the mortgage made to secure them, or either of the sales of lands, or the erection of the hotel or of the saw mill—to make his appli-

cation to a court of equity without unnecessary delay. And further, that the delay which preceded the commencement of this suit—regarded in connection with the large sums of money invested by directors and stockholders of the company, as well as by third persons in the intervening time, and upon the faith that the proceedings of the company were legal—has been sufficient to warrant a denial of relief to the plaintiffs in a court of equity. The plaintiffs' duty to proceed at an earlier day was, in the view of the master, no less to the directors and other stockholders of the company—who contemplated investing their own money in large sums, incurring heavy expenses, and assuming new relations to the property, in the belief that they were acting by due authority and for the general good—than to third persons who were to enter into contracts and invest their money also, upon the faith of the legality of the company's acts. The various periods of delay between ten years as the longest, and eighteen months as the shortest, were surely long enough, under the circumstances of this case, to raise a counter equity against the plaintiffs. And it will be remembered that the rule, that a party guilty of unreasonable delay in the enforcement of his rights thereby forfeits his claim to equitable relief, is more especially applicable to cases in which he lies by until other parties have incurred expenses, invested money, or entered into relations or engagements of a responsible or burdensome character."

The master reported that in his opinion the plaintiffs' bill should be dismissed; he reported also the form of a decree in accordance with his opinion.

The plaintiffs filed exceptions to the report.

The court at Nisi Prius (WILLIAMS, J.) overruled the exceptions, and decreed that the bill be dismissed.

The plaintiffs appealed to the court in banc, and in a number of specifications assigned the decree for error.

S. G. THOMPSON and H. M. WATTS, p. p., for appellants. —The subscription to the stock of the railroad company was not within the powers conferred by the charter, and to such powers the corporation was restrained: *Coleman v. Eastern Co.*, 10 Beav. 15; *Solomons v. Laing*, 12 Id. 252; *Taylor v. Chichester & M. Railroad Co.*, Law Rep. 2 Exch. 370. The

charter does not authorize the corporation to execute a mortgage; it therefore could not do so: *Commonwealth v. Erie & N. E. Railroad Co.*, 3 Casey, 339. The act under which the second mortgage was made, authorized the borrowing money to *improve and develop* the lands; the mortgage was authorized by the stockholders to discharge the present indebtedness, and provide for future obligations; it was therefore *ultra vires*. The lands were conveyed to the corporation under the condition in the charter that there should be an annual dividend; when that failed the land owner had the right to have his stock canceled, and the land reconveyed to him: *Pitts. & C. Railroad Co. v. Stewart*, 5 Wright, 55; *Turnpike Co. v. Wallace*, 8 Watts, 316. Neither was there power to sell the lands to the mining companies, and take in payment their stock, and thus deprive themselves of the means of carrying out the objects of their charter: *Bedford Railroad Co. v. Bowser*, 12 Wright, 30. The plan for the public sale of the lands gave a preference to shareholders who were creditors of the company, and was in violation of the rights of the others: *Reese v. Bank*, 7 Casey, 79. The directors were liable individually for injurious acts or omissions which they did not labor fairly to avert: *Kane v. People*, 8 Wend. 203; *Robinson v. Smith*, 3 Paige, Ch. 222; *Koehler v. Iron Co.*, 2 Black, 715; *Percy v. Milander*, 3 Louisiana, 568. If the act is clearly *ultra vires*, the director is liable, though acting honestly: *Spring's Appeal*, 21 P. F. Smith, 11.

H. G. CLAY, J. G. JOHNSON, G. W. BIDDLE and J. A. CLAY, for appellees.—Directors are liable only where they have been guilty of some fraud on the corporation or connived at it in others: *Spring's Appeal*, 21 P. F. Smith, 11; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; *Calhoun's Estate*, 6 Watts, 185; *Neff's Appeal*, 7 P. F. Smith, 91; *Konigmacher v. Kimmer*, 1 Penna. R. 215; *Eyster's Appeal*, 4 Harris, 372; *Dundas' Appeal*, 14 P. F. Smith, 325; *Knight v. Lord Plimouth*, 3 Atkyns, 480. The plaintiffs have been guilty of such laches as prevent them from obtaining relief: *Graham v. Birkenhead Railway Co.*, 2 Macn. & G. 146; *Efooks v. Railway Co.*, 19 Law & Eq. 7; *Cooper v. Hubbock*, 30 Beav. 162. Protests alone are not sufficient: *Clegg v. Edmondson*, 8 DeG.,

Macn. & G. 787; *Gr. West. Railway Co. v. Oxford*, 3 Id. 318; *Peabody v. Flint*, 6 Allen, 57; *Fuller v. Melrose*, 1 Id. 166; *Hilton v. Granville*, 1 Craig & Phil. 292; *Leaming v. Wise*, 23 P. F. Smith, 173; *Negley v. Lindsay*, 17 Id. 226; *Ashhurst's Appeal*, 10 Id. 290. The primary duty of the company was to sell their lands; unless such road as the Sunbury & Erie Railroad were built this could not be accomplished; the power to subscribe for the stock was necessarily incidental. The act of 1852 gave this power; being an enabling public act, it was not necessary that the stockholders should accept it, and it was a general law when this company was incorporated: *Brown v. Commissioners*, 9 Harris, 37; *Commonwealth v. Slifer*, 3 P. F. Smith, 71; *Commonwealth v. Montrose*, 2 Id. 391. The company having authority to contract debts, the bonds are good, though the mortgages were unauthorized: *McMasters v. Reed*, 1 Grant, 47; *Commonwealth v. Perkins*, 7 Wright, 402. A purchaser of a bond has the right to presume that every prerequisite to give it force has been complied with: *Commonwealth v. Pittsburg*, 10 Casey, 520. A power in a corporation to purchase real estate implies a power to sell and mortgage: *Jackson v. Brown*, 5 Wend. 590; *Angell & Ames on Corp.*, 200; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280; *Brady v. Meyer*, 1 Barb. 584; *Curtis v. Leavitt*, 15 N. Y. 9; *Leavitt v. Blatchford*, 17 Id. 521; *Barnes v. Ontario*, 19 Id. 152; *Fay v. Noble*, 12 Cush. 1; *Davis v. Meeting House*, 8 Metc. 321; *White Water Canal Co. v. Vallette*, 21 Howard, 414; *Strauss v. Eagle Ins. Co.*, 5 Ohio, 59. A power to borrow implies a power to mortgage: *Susquehanna Bridge Co. v. Ins. Co.*, 3 Md. 305; *Richards v. Merrimac Co.*, 44 N. H. 127; S. P. 4 Metc. (Ky.) 199; *Leggitt v. N. J. Bank Co.*, 1 Saxton, 541; *Gordon v. Preston*, 1 Watts, 385; *Zane v. Kennedy*, 23 P. F. Smith, 182. A director or officer of a corporation who is its creditor, may purchase its property: *Murray v. Vanderbilt*, 39 Barb. 157; *Mickles v. Rochester Bank*, 11 Paige, 119; *Worcester Turnpike Co. v. Willard*, 5 Mass. 80; *Middlesex Turnpike v. Swan*, 10 Id. 384; *Ashhurst's Appeal*, 10 P. F. Smith, 290.

Mr. Justice GORDON delivered the opinion of the court, October 12, 1874.

In the absence of a demurrer, we treat as waived those objections to the bill which are urged on the ground of multifariousness, both as to the parties and the relief prayed for.

Exceptions of this kind are but technical, and if brought to the notice of the court in a formal manner, and at a proper time, opportunity is furnished to the plaintiff to meet them by amendment. If, however, the defendant does not see proper thus to bring them to the notice of the court, it will be presumed that he elects to proceed with the case on its merits.

Besides this, the court generally has power, by its decree, to meet and obviate any difficulties that may arise from causes of this kind. We therefore proceed, at once, to the investigation of the charges made against the directors of the McKean and Elk Land and Improvement Company, who are the real defendants in this case.

The plaintiffs, shareholders of the stock of this company, charge the directors with a mismanagement of the affairs of this corporation, so obvious and gross, and so willfully perverse of the charter thereof, as to amount to a fraud upon their rights and interests. It is for cause of this kind that our intervention as a court of equity is demanded.

That a bill may be maintained against directors personally, under circumstances such as above alleged, is well established by many authorities. Among the most recent we cite the case of *Spering's Appeal*, 21 P. F. Smith, 24.

Not only may the shareholder thus call the directors to a formal account where he has been fraudulently deprived of money justly belonging to him, but he may also, under proper circumstances, interpose for the protection of the company itself: *Gravenstine's Appeal*, 13 Wright, 310, THOMPSON, J.

Having thus disposed of the technicalities incumbering the case, we proceed to examine the specific charges brought by the plaintiffs against the defendants, and upon the truth or falsehood of which this case must be determined.

The directors, defendants, are charged with the commission of the following acts, either wholly without warrant or in excess of the powers vested in them by the charter of incorporation, viz.:

1. Subscribing for sixteen hundred and twenty-five shares

of the Sunbury and Erie Railroad Company's stock, to be paid for by one hundred thousand dollars in cash, and five thousand acres of land.

2. Executing two mortgages upon the land of the company, one dated February 1, 1863, and the other June 22, 1867; the first to secure the payment of bonds, therein recited, to the amount of two hundred thousand dollars, and the second to secure the payment of like bonds to the amount of two hundred and sixty-seven thousand dollars.

3. Executing, in the year 1865, deeds for a large body of the company's land, to the New York and Erie and the Erie Mining Companies, and taking in exchange therefor 11,750 shares of their stock.

4. Selling 35,600 acres of the company's land to the stockholders, including themselves, to be paid for in the manner following, viz.: sixty-two per cent. in the stock of the corporation, thirty-six per cent. in the bonds thereof, and but two per cent. in cash.

5. Erecting saw mills, a hotel and other buildings upon the corporate property.

In this brief of the plaintiff's specifications of the misdeeds of the defendants we have not included one or two of minor import, which we may now notice and dispose of.

It is alleged that Mr. Watts has persistently since November, 1859, endeavored to purchase from the directors so much of the lands of said company as he might justly be entitled to, offering to pay for the same in shares of its stock, and that they have as persistently refused to accede to his offers.

It is further alleged that they refused a bid of twenty-five dollars per acre from one Mr. Putman for four thousand acres of said lands.

In the first of these alleged cases, we are not sufficiently informed, from the evidence, to determine whether the directors did well or ill in rejecting these offers.

In the second case, the evidence leaves it very doubtful whether any such offer was made with the *bona fide* intent to purchase.

Admit, however, that this offer was made in good faith, and that in both cases the propositions were imprudently rejected, yet, as they were matters resting wholly in the judg-

ment and discretion of the directors, they are beyond our power of review. Their conduct in the premises may have been unwise, but it was not legally reprehensible.

Without regard to the order of the charges as contained in the bill, we proceed to discuss the items thereof as they present themselves to our mind in apparent legal sequence. First, then, had the directors power to contract debts for the company, and to execute bonds and mortgages to secure the payment thereof? In the case of the *Commonwealth ex rel. Reinboth v. The Councils of Pittsburg*, 5 Wright, 284, Justice STRONG says: "The power to execute and issue bonds, contracts or other certificates of indebtedness, belongs to all corporations, public as well as private, and is inseparable from their existence." If this be good law, and we think it is, the question as to the power of the directors of the McKean and Elk Land and Improvement Company to contract debts and issue the bonds of the corporation therefor, would seem to be settled. The very power to contract necessarily involves the cognate power to create debt; and a corporation without such power would be a body without life, utterly effete and worthless. If, however, it be objected that one may have the power to contract debts binding upon his principal, and yet not have the power to bind him by deed, it is answered, these directors have such power under the charter. They have the power to dispose of the whole of the company's lands, by deed or lease, and as they possess this superior power, the minor one of the mortgaging those lands upon a proper occasion, and for a proper debt, may be inferred: *Lancaster v. Dolan*, 1 Rawle, 231; *Gordon v. Preston*, 1 Watts, 385.

The inquiry, then, is not as to the general authority of these men to contract debts on the credit of the company, and to provide for their payment by issuing of bonds secured by mortgage, but it is rather, had they the power to contract the specific debts complained of? If not, was the contracting thereof so clearly beyond their powers that we must impute to them the commission of a willful wrong or a carelessness so obvious to ordinary discretion that it amounts to the same thing?

There is nothing in the evidence which tends to show that what these directors did in the premises was intended to

benefit themselves beyond or above their fellow shareholders, or to implicate them in any actual fraud. Under such a state of facts, we will not consent to charge them with the results of such ordinary errors of judgment as men of common prudence might fall into, in the conduct of their own business.

The status of directors, and the amount of judgment, care and skill required of them, is so clearly set forth in the opinion of our brother Sharswood in *Spering's Appeal*, 21 P. F. Smith, 11, that we are relieved from the necessity of further investigation or elaboration of these points.

From this case we learn that directors are mandatories only, and as such held to but ordinary skill and diligence, and are not responsible to their fellow corporators for the want of judgment and knowledge. They are personally liable only where they are guilty of fraudulent conduct or of acts clearly *ultra vires*.

With this light upon the subject it is not difficult for us to determine that the charge of the misappropriation by the directors of the funds of the company by the erection of saw mills, a hotel and other buildings, can not be sustained. For it will be observed our inquiry is limited to the question of the power to make such improvements. If they had such power, we, as already intimated, will not sit to determine whether or not they erred in judgment in respect to the character or cost thereof.

Now this corporation had, *inter alia*, these very general and necessary powers, to wit: "To aid in the development of the minerals and other materials" in and upon the lands, and "to promote the clearing and settlement of the country."

We know of no other material upon these lands more abundant or more obviously requiring development, than the timber, which covered them in an almost unbroken forest. Neither can we conceive of anything better calculated to develop this kind of material than saw mills. So we regard a hotel, of some kind, in so large a territory of wild lands, as not only a convenience, adding greatly to the settlement of country, but a necessity.

Conceding, however, that we have misread the charter, and that the defendants exceeded their power in the erection of the buildings, yet, as none of the plaintiffs or others of the share-

holders objected during the time of their erection, nor until the filing of this bill, some two years after the completion of the last one, the hotel, it would indeed be a very strange kind of equity that would compel the directors to account for moneys expended in an enterprise in which the plaintiffs, by their silence if nothing more, acquiesced. Furthermore, it is not alleged that the hotel, the building concerning which the greatest complaint is made, has not accomplished its purpose; that the company did not derive all the advantages which were expected, or that the building is not worth all it cost. As, therefore, no loss has been wrought, no account can be taken.

With regard to the subscription to the stock of the Sunbury and Erie Railroad Company, we are inclined to think that this act, though perhaps not wholly beyond the powers conferred by the charter, was at least in excess of that authority. The subscription amounted to one hundred and sixty-two thousand dollars; the stock was worth only about thirty-six dollars in the hundred, hence there was in effect a donation to the railroad company of about one hundred thousand dollars, but this amounted to as much as the entire capital stock authorized by the act of Assembly to be raised for improvement purposes.

Notwithstanding this, the question remains, was this act so clearly in excess of their authority that the directors were bound to know and avoid it? Because, if, while these men were acting honestly, and for what they esteemed the best interests of the company, they were not willfully perverting their powers, but only misjudged the same, we can not consent to compel them to account personally for the moneys thus expended. In order to arrive at a correct conclusion in this matter we must consider all the circumstances by which they were surrounded.

The powers already noticed, to aid in the clearing and settling of the country, as well as the further power to build not more than twenty miles of railroad, were conferred upon the company in order to make the main object of its organization, *i. e.*, the sale of its lands, at remunerative prices, feasible.

This property lay in a section of the State remote from any large stream, and some forty or fifty miles from the nearest railroad. Even the common roads were few and almost im-

passable. Under such circumstances these lands were, so far as a present market value was concerned, not worth the taxes annually assessed on them; yet they contained within them valuable minerals and were clothed with forests of excellent timber. But these were useless without the means to transport them to market. When, therefore, the directors of the Sunbury and Erie Railroad proposed, upon a subscription to their stock of one hundred and sixty-two thousand dollars, to adopt a route for their road which would carry it through the heart of the McKean and Elk Land and Improvement Company's land, it is not surprising that not only the directors but also the stockholders thereof should have agreed to the proposition. That they had the power to build both common roads and railroads, or to aid others to a reasonable extent in so doing, is beyond doubt. Under such circumstances, their subscription, though larger than was warranted, looks to me more like a mistake in judgment than a willful perversion of power. But passing this we come to another phase of this case, which we regard as definitive. This subscription, as before observed, was made for the honest purpose of benefiting the company; it was not made in haste, but was some four years in process of consummation. In the meantime it met the approval of the stockholders at their meeting, May 16, 1862. There was, therefore, ample notice to all concerned, and ample time for protest and the intervention of the preventive process of the law. Without any precedent authority we might well come to the following conclusions: first, that when an act done by directors is in excess of their authority, yet has been done with the *bona fide* intent of benefiting the corporation which they represent, and a shareholder knowing thereof does not dissent within a reasonable time, his assent to the act will be presumed, and he will be estopped from gainsaying it. For his silence, when he ought to speak, is such a neglect of duty toward those who are gratuitously serving his company, that he is entitled to no consideration in a court of justice.

Second. That when the act complained of is to be followed by a large expenditure of money, the shareholder should not only file his protest within a reasonable time, but should follow up the same by active preventive means. For it is obviously against good conscience, that one having the power

to prevent it should stand by and see his associates expend money that may result to his benefit, and afterward charge them therewith. He may not thus pocket the gain resulting from his delay, or thus wait in order to observe the result of the experiment, and when it fails to produce the result expected, fall back upon his protest as a saving of his legal remedies. His neglect to act at the proper time bars his right of action as effectually as his neglect to protest.

These doctrines are, however, abundantly supported by the authorities quoted by the learned counsel for the defendants: *inter alia*, *Great Western Railroad Co. v. Oxford*, 3 DeGex, Macn. & G. 341; *Clegg v. Edmondson*, 8 Id. 787; *Ashhurst's Appeal*, 10 P. F. Smith, 290.

So far as we are informed, none of the plaintiffs, except Mr. Watts, so much as interposed an objection to this action of the directors. They are therefore so clearly in default and so obviously estopped by their neglect, that we may dismiss their claims without further consideration.

Henry M. Watts, however, did interpose his dissent. He did so in his letter to the company dated November 19, 1859. Again, in his letter to John C. Cresson, president of the company, dated 24th day of February, 1862, he reiterates the opinion that the subscription was *ultra vires*. It was not, however, until the 19th day of September, 1866, that he so much as intimated the possibility of a suit for the purpose of testing the action of the board in making this subscription and executing the mortgage. Were these expressions of dissent sufficient to relieve him from the charge of neglecting the proper assertion of his rights until through his own laches he had forfeited them?

From 1859 to 1863 this matter was in abeyance, unconsummated. He was fully informed of every step in the programme. He knew that in 1862 the stockholders had ratified the action of the directors, by authorizing the execution of the bonds and mortgage in order to raise the money with which to pay the subscription. Yet, during all this time, he contented himself with a mere dissent. A dissent, clear enough, indeed, as to the doubts and legal propositions therein raised, but nothing but a dissent. Under the circumstances, we think he did not do all that was required of him. Had

he at the proper time invoked the restraining power of the courts, all things would have been properly adjusted, and all improper actions arrested. Instead of this, he refrains from this obvious course of action until the matter is fully consummated, and until he has derived every possible benefit therefrom. He permits the experiment to proceed to completion before he attempts to call his fellow corporators to an account. Under such circumstances we could not have helped him had he commenced his proceedings immediately after the payment of the subscription to the railroad company. But his case is entitled to still less consideration, because he allowed no less than seven years to pass between the consummation of the transaction and the issuing of his legal process.

Were we to hold these directors to the duties and responsibilities of trustees, yet six years would bar an action against them for misuse of the corporate property: *Ashhurst's Appeal, supra*.

The charge relating to the transfer of lands to the New York and Erie and Erie Mining Companies, and the taking of their stock therefor, can not be sustained. Whilst we are inclined to think that this exchange of land for stock of companies other than their own was unwarranted, yet no harm has been done upon which the plaintiffs can found a bill. If this act of the directors was *ultra vires*, it is very clear their deed conveyed no title. All persons dealing with them for the lands of the company were bound to take notice of the extent of their powers, and if the companies named chose to deal with them outside of those powers, they took nothing thereby. It follows that, as the company lost nothing, the directors are liable for nothing. If, however, the act was within their powers, they did what their judgment dictated as best to be done, and we can not interfere to review a matter of discretion; *a fortiori*, when the shareholders interposed no dissent at the time, nor until the bringing of this bill.

With reference to the sales made in 1868, a few words will suffice. These sales were ordered by the stockholders themselves. Payment in the bonds of the company was equivalent to payment in cash, and payment in the stock of the company was expressly authorized by the act of incorporation. That the directors should be permitted to purchase was part

of the arrangement, and was beneficial to all parties. They were therefore within the rule asserted by Justice STRONG in *Ashhurst's Appeal*.

The whole affair was conducted openly and fairly; the lands brought good prices, much better than could have been realized at cash sales, and we can not see what good could be accomplished by setting them aside.

Thus, upon a careful review of all the points made in this case, and of the facts revealed by the master's report, and the paper books submitted to us by the parties, we have no hesitation in coming to the conclusion that the decree of the Court of Nisi Prius was correct.

Appeal dismissed at cost of appellant.

EVANS' APPEAL. KUHN'S APPEAL.

(81 Pennsylvania State, 278. Supreme Court, 1876.)

¹ Laches, within limitation period. As a general rule, a constructive trust as to personal rights may be asserted at any time within six years after the knowledge of the facts creating it; but *laches*, for a shorter period, aided by other circumstances, will bar the right.

Delay of stockholders to assert fraud of organizers. Plaintiffs filed a bill alleging that they and defendants were associated in the formation of a company; that defendants purchased lands and sold them to the corporation at a price much beyond cost, concealing the price paid, whereby a resulting trust arose; praying for an account of the profits, etc. Under the circumstances of the case the bill was dismissed, on the ground of *laches* in filing it, four and one half years after knowledge of the facts.

Relief sought through corporate equities. Where the bill is brought by stockholders, praying the payment of money not to themselves but to the corporation, and seeking relief through the equitable rights of the corporation, the knowledge and conduct of the corporation become essential to be considered; and the facts on which relief is asked appearing on the minutes of the corporation, a delay of nearly six years amounts to an acquiescence.

Rights intervening, pending the delay. Allowing money to be borrowed and judgments against the company to be obtained and their property sold, the facts for relief being meanwhile patent to the plaintiffs: *Held*, such intervening circumstances as made the delay unreasonable, and fatal to the bill.

¹ *Warner v. Daniels*, 6 M. R. 436.

Laches will bar a plaintiff against acts originally voidable.
Subsequent plaintiffs. The *laches* of parties made plaintiffs by amendment after the suit was commenced, *considered* as running up to the time of their seeking to become parties.

March 1, 1876. Before SHARSWOOD, MERCUR, GORDON, PAXSON and WOODWARD, JJ.

Appeal from the Court at Nisi Prins, No. 56, to January term, 1870. In equity.

The bill in this case was filed March 19, 1870, by Manlius G. Evans and Hartman Kuhn against Charles L. Borie, Henry P. Borie, Edward V. Maitland, Charles Wister, Samuel Wood, Edward M. Hopkins, Charles P. Bayard, Edward T. Shaw, Joseph C. Harris, William Harris, John P. Bell, Ezra Bowen, George S. Fox, Camille D'Invilliers and The Keystone Zinc Company.

On the 9th of September, 1870, an amendment to the bill was filed. On the 13th of December all the defendants, except Wood, Shaw and William Harris, filed answers. On the 16th of December a replication was filed. Testimony was taken in the cause until June 15, 1872, and on the 1st of July and the 24th of October, 1872, respectively, Charles Wells and H. F. Kenney, on their petitions, were allowed to become plaintiffs in the cause. On the 11th of January, 1873, on affidavit of plaintiffs, an amendment was made, allowing the plaintiffs to add the names of Adolph E. Borie, George Trotter, George T. Lewis and Nathan Bartlett, as defendants.

The answers of Adolph E. Borie, George T. Lewis and George Trotter, were filed on the 30th of January, on the 10th of February and the 17th of May, 1873, respectively.

On the 2d of October, 1873, Edward Olmstead, Esq., was appointed master. His report set out the bill and answers much at large.

The bill, which was on behalf of the plaintiffs and such other stockholders of the Keystone Zinc Company as should come in and contribute, etc., was substantially as follows:

On the 9th of May, 1854, Charles Wister and others, their associates and assigns, were incorporated by the name of the

Keystone Zinc Company, for mining zinc ore and manufacturing and selling zinc paint in the counties of Northampton and Lehigh.

In March, 1864, the defendants formed the design of making profit from land in Blair county of which they had heard as containing zinc ore; and they announced that they had secured lands containing zinc ore and were forming a company to develop them, the capital stock to consist of 200,000 shares, at \$5 per share.

In consequence of these representations, about March 24, 1864, Evans, plaintiff, took 1,000 shares and paid \$5,000 for them, believing that he thus became an original subscriber; at the filing of the bill he still owned 300 shares. Kuhn, plaintiff, took 6,000 shares, and paid \$30,000 for them, believing the stock belonged to the company and the purchase money would go into their treasury; he still held all the stock.

Kuhn took no receipt, but Evans and others, who subscribed for stock, took a receipt in the following form:

"Received of ———— dollars, in full for a subscription to ——— shares of stock in a company, to be hereafter organized under the title of the Keystone Zinc Company, with a capital of one million of dollars, divided into two hundred thousand shares, at five dollars each."

Subsequently certificates for the number of shares subscribed for by the plaintiffs were received by them.

Large sums of money were thus received by the defendants on these representations for stock; this money was in part paid to the owners of land, and the remainder appropriated to the defendant's own use and never entered on the books of the company. Whilst taking measures to obtain these moneys, the defendants were negotiating for the land and taking measures to secure them for the company which they were organizing. On the day Kuhn paid for his stock, C. L. Borie, acting for the defendants, obtained from Lewis, one of the defendants, a contract to convey to him, Borie, two tracts of land in Blair county, containing, together, 186 acres, for \$100,000. On the next day C. L. and H. P. Borie, defendants, obtained from H. B. and G. N. Tatham a contract to convey certain leaseholds in the same county for \$50,000;

these were also secured for the company by the two Bories with the intention of vesting the title in the company. The plaintiffs averred that all the defendants were jointly concerned in the common object of endeavoring to make an illegal profit by buying lands for a company which they were forming at one price and selling to the company at a higher one. At the same time the defendants were engaged in obtaining a charter and organizing under it. On March 28, 1864, there was enacted an act supplementary to act of 1854 before mentioned, extending its provisions to Blair county. The company was organized by a meeting of Charles Wister and two others of the corporators named in the act of 1854; at this meeting a book for subscriptions for stock was opened and subscriptions were made by several of the defendants before any money had been paid to the company for stock or a conveyance made to them, and without notice to the plaintiffs and others to whom stock had been sold, C. P. Bayard was elected president, C. L. Borie, treasurer, H. P. Borie, G. S. Fox, E. V. Maitland, J. P. Bell and Charles Wister, directors. The defendants were affected with a fiduciary relation to those whose money was thus obtained, and were bound to pay for any stock which they took, and to put all the money which they received for stock into the company's treasury, and to buy the lands at the lowest prices without any profit to themselves, and every right and interest in the land bought from Lewis and the Tathams belonged to the company.

On the morning of the 8th of April, 1864, the day after the land had been paid for by defendants and the title made to C. L. Borie, they procured a meeting of the directors, who resolved to buy the land from C. L. Borie for \$200,000; they afterward procured another meeting in the afternoon of the same day, at which they rescinded this resolution and passed one to pay Borie for the land by one hundred and ninety thousand shares of stock at the par value of \$5 per share, that being the entire stock of the company, except ten thousand shares.

These 190,000 shares or the money raised by the sale of them, were divided among the defendants. This resolution actually passed to Borie and the defendants the cash proceeds of shares already sold which were far more than all that

had been paid for the land, and also the unsold shares, if any, to fill up the one hundred and ninety thousand shares. The sum actually paid for the land was \$200,000.

The defendants owned or controlled a majority of the stock of the company, and some of them were its directors and officers, and neglected and refused to take measures or to permit the company to take any measures against themselves for the purpose of granting the relief the plaintiffs prayed for; and that, therefore, no relief through the intervention of the company could be obtained.

The plaintiffs prayed:

1. That the defendants might be compelled by the decree of this court to pay into the treasury of the company \$5 per share for each of said 190,000 shares of said stock so allotted or transferred by resolution of April 8, 1864, to defendants, or to Borie for them, with interest, deducting the sums actually *bona fide* paid for the lands so acquired for said company.

2. Or if the court shall be of opinion that such a decree is more consonant with equity, might compel defendants to pay into the treasury of the company, with interest, all sums received by them or any of them from sales of said one hundred and ninety thousand shares, or any part of them, less what they paid for said lands, and might surrender all of said 190,000 shares which they have not so sold.

3. That if such a course be necessary in order to enable the court to reach such a decree, or prepare the way therefor, the company might be compelled to take such steps and commence such proceedings against said defendants as may be or become proper or necessary for the purpose of enforcing against them the redress sought by this bill.

4. Further relief.

The bill asked for relief by reason of a trust arising by implication of law, more than five years before filing the bill; the plaintiffs were therefore barred by the 6th section of the act of April 22, 1856.

The individual defendants answered.

Lewis was the owner of the farm in Blair county, and had also an interest (with one Taylor) to the extent of one half in the Tatham leasehold.

For at least a year before March, 1864, Lewis had been

speaking to C. L. Borie and Hopkins, and had made many representations as to its value. Wister had also endeavored to induce his co-defendant to unite with him in purchasing the lands of Lewis, the inducements being its intrinsic value, and the certainty of being able to sell at an advance; no determination had been reached as to the mode of turning it to profit. On March 1, 1864, Wister procured from Lewis a contract to sell his farm in Blair county to C. L. Borie, Hopkins and Wister, the price being \$100,000 with an option for a month to buy or refuse; the contract was secured by Wister without consultation with the others, his object being to secure for himself power to participate in the purchase.

While these three had this option Tatham asked Borie to unite in forming a company with leasehold property held by them; Borie said he and his associates thought of doing that with the Lewis property, and suggested to Tatham to join both properties in one company; the Tathams were informed that the Lewis property would be put in at \$100,000, the Tatham at \$50,000, two thirds of the stock to belong to the owners of the Lewis land and one third to the owners of the Tatham land. Tathams declined this, but gave Borie by writing an option till April 1st, to buy their property at \$50,000. On the 24th of March, Wister urged Borie to close with Lewis, assuring Borie that he, Lewis, could immediately re-sell at a profit. C. L. Borie, for himself and Henry Borie, said he would sell at \$200,000, which would yield \$50,000 profit, the Tatham property to be included, though no reference had been made to that property, Wister believing from inquiries that he could at that price find purchasers, they intending to form a company, the land to be converted into stock. This was the only proposal made to these defendants, and on this they consented to join. Borie, at Wister's request, drew a paper to be signed by persons entering into the project; it was as follows:

"We, the undersigned, hereby agree to pay to Mr. Charles Wister or his assigns the sums opposite to our names, or a *pro rata* proportion of the same toward the purchase of the zinc property in Blair county, embracing the entire interest of Mr. G. T. Lewis in a farm or farms containing 200 acres of ground, more or less, certificates of stock to be issued to us as soon as the company can be organized; cash to be paid on

execution of the deed, in the name of such party as we may agree upon, for a sum not exceeding \$200,000."

Borie then bought the property from Lewis.

C. L. Borie had expected that the \$100,000 would purchase Lewis' interest in the leasehold as well as his farm, but Lewis declined and required that he should be paid for his leasehold interest as much as the Tathams were to receive; this interest had not previously been referred to, and Borie had no right to agree for the others. He entered into a contract for this interest for himself and H. Borie intending the others to take it if they chose. Wister procured signatures to the paper to the extent of \$130,000, but it was not deemed by any that there was a binding contract, both because there were but \$130,000 subscribed, and the contract was but verbal with Borie, although he had contracted in writing with Lewis. Borie was then unwilling to sell unless the new interest in the leasehold was included and the price increased to \$250,000; of this Wister and others who had signed the paper were informed. There was then no binding contract affecting the title bought by Borie from Lewis, except Wister and Hopkins, nor any supposition then that Borie could not vary his offer. One of the signers to the paper proposed that they should give the Bories and their associates forty thousand shares of stock in the company intended to be organized in addition to the cash price they had agreed to pay. This being agreed to by Borie, he, on behalf of his firm and others who had authorized him to do so, subscribed enough to make up the \$200,000 and to form a corporation, the capital of which was to be the land and the stock, to be issued to the owners of the property in the proportion of their interests. There were then added to the paper the names of several persons on whose behalf Borie undertook to sign, and the whole amount of \$200,000 filled by subscriptions in sums of \$20,000, \$10,000 and \$7,500. The names of all the original individual defendants, except Woods, were to the paper, and also the names of A. E. Borie, Trotter, Lewis and Bartlett, afterward brought in as defendants. At this time no one was interested but those who had signed the paper, and none of those who had originally signed were bound, because of the change after they had signed; but on the same day they ratified the

change. None of them supposed that the Bories, Wister or Hopkins had been their agents. They were then under no obligation to apply for a charter, and when they obtained it none were included but those whom the grantees of the franchises admitted as associates; and, therefore, when the corporation was formed it was bound by the terms of the purchase, which had been settled before the contract was applied for.

When the Bories, Wister and Hopkins agreed to sell to those about to form a corporation, there was a refusal at the cost, and a demand for an advance which was accepted. There was then no power in anybody to require the purchasers to sell on any terms, and no pretense that they acted as agents for any one. Those who bought and agreed to convey to the corporation agreed subsequently among themselves to contribute 10,000 shares to be sold and the proceeds paid to the company for working capital. The organizers of the company agreed to pay for the land \$200,000 and 40,000 shares. 160,000 shares were received by the owners of the property as the price of giving it to the corporation, and they sold 10,000 shares of the 160,000, and gave the proceeds to the corporation as working capital. Forty thousand of the one hundred and fifty thousand remaining, were sold to reimburse the cash paid for the property. One hundred thousand shares, more than a year afterward, were distributed amongst the owners in proportion to their rights. The larger portion of these shares was still owned by these parties. Twenty-eight thousand shares were sold more than a year after the company was organized at the then market price; and it is impossible for any one claiming in the right of the corporation to demand, as the property of the corporation, the difference between the cost of the property and the amount realized by the purchasers out of their stock sold, on the ground that C. L. Borie and his associates bought as agents of the corporation. On the 24th of March, 1864, the contract was signed to buy from the purchasers from Lewis. The Tatham property was not included. Some of those buyers, deeming the contract complete, offered to sell their proportion of shares of the stock they were to receive. They had offers to take it at the price named by them. These offers were without representa-

tions as to capital or property or cost; all that was stated was that it was a zinc farm; and the price five dollars per share.

Neither of the plaintiffs were amongst those offering to buy; those who did offer were afterward referred to the broker authorized to sell for all the owners jointly; they made their contract with him, paid him the money and received their stock. All these were "the private acts of the individuals who, expecting to complete an inchoate bargain, had in anticipation proposed or agreed to sell the property they would receive if that bargain had been carried out. That bargain was never made, as has been stated. A distinct one was substituted, and under it these purchasers received the stock they had offered to sell, but on very different terms from those anticipated when they proposed selling. They submit that none of them are in any manner liable to the corporation by reason of any such transaction."

Harris, an expecting purchaser, on March 24th, after the contract of that date had been signed, supposing the transaction was settled, told Kuhn there was a zinc stock "we are about buying, on the market, and I think money can be made on it. The price is five dollars." There was no statement as to the location or cost of the property. They denied that Evans, through Fisher, made any contract by which he got any right to stock before March 28th. Fisher applied for one thousand shares of stock to Fox, who, supposing all that had been authorized to be sold had been sold at five dollars, agreed to sell at six dollars. Fisher accepted. Fox learning that the broker had not sold all that he had been authorized to sell at five dollars, relieved Fisher from the sale, and referred him to Maitland, their broker, from whom, on the 28th of March, he bought one thousand shares for \$5,000. The defendants insist that neither the corporation nor the plaintiffs, litigating in their name, can claim relief under these circumstances.

On the 25th of March, at a meeting of some of the owners, it was ascertained that some had sold their stock. C. L. Borie being dissatisfied with this because it would interfere with the sale of his forty thousand shares, it was agreed that all sales should be by a common broker, and to be made *pro rata*; those who had given orders to individual owners were turned over

to the broker, and through him all sales were made; it was agreed ten thousand shares to be contributed *pro rata* should be sold for working capital; this was done and the proceeds paid to the corporation after its organization. It was also agreed that 100,000 shares should be sold. Borie at that meeting said that as stock could not be issued until after the corporation should be organized if any were sold and paid for before, a memorandum should be given to the purchasers of the fact and for that purpose the form of receipt mentioned as having been given to Evans was prepared and the recital that the money was paid by subscription is untrue if implying that the money was paid on a subscription to a corporation.

Arrangements were then made for procuring a charter; the charter of 1854 being under the control of one of their number, on their application was extended to Blair county; the incorporators, under the act of 1854, associated with them those who desired it, and they organized, elected officers and prepared to issue stock; the purchasers of shares did not then know whether the company would be organized under the general law of 1854, allowing land to be taken as stock or under a special charter. Immediately after Borie made the contract and before any sales were made, on the 25th of March, he called for fifty per cent. of the cash purchase money, and on the next day \$100,000 were paid to him, none of which was from the sale of stock. Kuhn, on the 24th, deposited with Harris United States certificates of debt for his stock, but none of his money was used for the purpose; Harris advanced his own money and Kuhn's securities were not cashed until the 28th; there was no agreement amongst any of the parties to organize a corporation and take the stock as a consideration for the property, less \$50,000 to be raised from the ten thousand shares. Even if those who bought from Borie with intent to organize a corporation were compelled to let the corporation have the property at cost, the defendants are required to account to the corporation only for the profit of the transaction, which was \$50,000, the proceeds of the ten thousand shares, viz: of the 200,000 shares, the capital, 100,000 shares, were left with a committee of the purchasers; 40,000 shares realizing \$200,000 were paid for the property; and in addition there were paid 40,000 shares by agreement; there were

10,000 shares for working capital, which would leave 10,000 shares as above stated. The 100,000 shares left with the committee were not to be put on the market for a year; after that time they were distributed amongst the parties, and there were still held by them under that distribution 72,000 shares.

If it were a mistake to receive money for stock as subscription to capital instead of as the price of stock sold, it was a contract of the seller with each stockholder and not with the corporation representing the aggregate body of the purchasers, and the cause of action would be the difference in value as represented to the purchaser and the actual value.

This answer averred that the Bories, Bell, Maitland, Bowen, Fox, Bayard, D'Invilliers, Hopkins and Wister, defendants, were creditors of the corporation to the amount of \$36,500 with interest.

Any claim on the ground of misrepresentation, that the money paid was for subscription to the capital, could not be pursued by the corporation, not being a right common to all the stockholders; and this would be a matter between the particular person defrauded and the party defrauding. It was still averred that the plaintiffs had no cause of action, as they did not give more for the stock than its market value when they purchased. Up to April 1st stock could not have been bought at a less price than they paid, and up to April 4th it was generally at a premium. The corporators in the act of 1854 did not contemplate any connection between their charter and the property mentioned in the bill; but when the owners of the property contemplated organizing a corporation they applied to the corporators to enable them to act under it. On March 24, 1864, it was agreed to organize a corporation, and they obtained a charter for that purpose on March 28th. Evans' agent, when he bought the stock, knew he bought it from persons who had undertaken there should be such a company. Kuhn's agent told him it was a stock "we are about bringing out," and on this he ordered the stock. The purchasers of the stock acquiesced in the conduct of the defendants in regard to the transacting by accepting their certificates and not making complaint until they filed this bill nearly six years afterward.

The defendants were holders of a majority of the stock,

some of them directors and officers. They did not control the company in respect of suits, etc. Until this bill was filed no one had asked the officers to sue. This acquiescence was not from ignorance. In 1865, and after the stock had declined, they made a request to examine the facts. A committee of stockholders was appointed, to whom all the facts were stated, explanations made and papers furnished; every fact now known was then known and made as public as possible. The report of committee of stockholders was made in July, 1865. Several persons brought suits; one was withdrawn and the others have been pending for a long time and were never brought to trial.

The answer of the corporation averred that the charter of 1854 was obtained, and other persons associated with the incorporators for the purposes as stated in the foregoing answer, and that the facts stated in it were true.

If any trust existed it was an implied one and arose when the owners of the property transferred it and received the stock bargained for. This was completely done as early as April 1864; before any proceedings were commenced more than five years had elapsed and the right, if any, which the corporation had, was barred by the act of 1856.

The master found the facts as follows:

1. The act of May 9, 1854, which had been obtained by Wister, and was controlled by him.
2. The ownership by Lewis of the Blair county farms, and interest in the leaseholds in which Tatham also had a half interest.
3. About March 1, 1864, Wister procured from Lewis an option to purchase his farm for \$100,000, with the understanding that Borie and Hopkins should be interested with him, if they desired. They did not agree to participate until the 24th of March, Hopkins having previously inquired of Wister if he had not a charter for a zinc company.
4. Shortly before March 14th Wister employed a geologist to examine the land. His report was addressed to "C. J. Wister and his associates." The cost of printing the report was paid by the Keystone Zinc Company.
5. On March 21st, Henry Tatham consulted Borie as to getting up a company to purchase the Tatham leaseholds. He informed Tatham he was too late as his friends had talked

of forming such company with the Lewis farm, and that if Tatham was willing to take stock in a company that might be formed in payment of his leases, something might be made out of it. On the 25th Tatham inquired of Borie what the company was to be.

Borie informed him that if one should be formed, it would be on the basis of \$100,000 for the Lewis farm and the leases, and their relative value. Tatham declined, thinking the Lewis farm was not worth that sum. Borie said if Tatham would give him the refusal of the leases till April 1st, he would try to include them in any arrangement that might be made. The refusal for \$50,000 was given as requested.

6. Wister had been urgent with Borie and Hopkins to purchase the Lewis property and form a company, telling them if they would not, he could find one that would purchase and that would give them a handsome profit. Hopkins and Borie hesitated.

7. On March 24th Borie, Wister and Hopkins concluded to purchase the Lewis farm, Borie informing the others that he had the refusal of the Tatham leases for \$50,000 which, he added, ought to be included in the purchase by parties forming the company.

8. It was agreed that Borie should purchase the Tatham leases as well as Lewis' farm, for \$150,000 for the entire property.

9. It was further agreed that if Wister could find any parties to pay \$50,000 profit he might sell to them; but if not they would do what they thought best. Wister stated at this meeting of March 24th, as well as previously, that he owned or controlled a charter under the authority of which such a company could be formed.

10. The paper of March 24th, mentioned in the answer, was prepared and given to Wister for the purpose of obtaining signatures.

11. While Wister went to secure subscribers to this paper Borie completed the purchase of the farm. Lewis executed a paper dated March 24, 1864, viz.:

"For and in consideration of the sum of \$50 to me this day paid, I hereby agree to sell to Mr. C. L. Borie all my right, title and interest in my farm in Blair county, known as the

Waite farm, of one hundred and sixty-one acres, more or less; also a tract adjoining, of about twenty-five acres, known as the Galbraith property, for the sum of one hundred thousand dollars, upon the execution of satisfactory deeds, including all mineral rights."

12. Lewis refused to include in this sale his half interest in the leases; and after much bargaining, Borie agreed to buy this interest for \$50,000. Lewis executed this paper:

"It is also agreed and understood that for the additional sum of \$50,000 I will transfer and set over to said C. L. Borie or his assigns, all my right, title and interest, as well as that of Mr. Wm. J. Taylor as far as I can control them, in all or any leases held by me or him, severally or jointly with each other."

13. While Borie was concluding the purchase with Lewis, Wister procured to the first paper the signatures of Maitland, Bell, Shaw, Bayard, Fox, D'Invilliers and Harris, all for \$20,000 each, except Bayard, who subscribed \$10,000. Most of these had, before the paper was presented to them, been informed that a zinc property was for sale, in which they were wanted to take an interest with the view of forming a zinc company in which they were to become the owners of shares.

14. Before Borie left Lewis he asked him if he would like to join with others in buying the property and leases, and take stock of a company *pro rata* for his interest. Lewis agreed to take an interest of \$20,000, and Trotter, who was present, on being asked by Borie if he would take an interest, agreed to take \$20,000, and both Lewis and Trotter authorized Borie "to act and do for" them. On the same day Borie informed Lewis that he had subscribed \$10,000 each for Lewis and Trotter, with which Lewis said he was dissatisfied, and demanded more; he was allotted \$10,000 additional in the name Nathan Bartlett.

15, 16, 17. The facts as to Borie requiring \$50,000 additional in consequence of the purchase of Lewis' leasehold interest, the plan to give forty thousand shares additional to Borie, estimated at \$1.25 per share, and Borie's offering the amount of subscription that was needed, were found substantially as set out in the answer.

18. On the same day that this paper was signed, but after

it was signed, most of the parties to it offered for sale their stock or shares in the projected company. They were readily sold at five dollars per share. The parties agreed that Maitland should sell the stock on their joint account.

19, 20. About March 24, 1864, Harris informed Kuhn that he and a number of gentlemen had purchased property in Blair county, containing about one hundred acres, and leased twelve or thirteen hundred acres adjoining, together with the mining privileges; that the land was reported by a geologist to be very rich in zinc ore of an excellent quality; that they intended or were about to organize a company with a capital of two hundred thousand shares. Harris added that believing this to be a valuable property he had come to give him a chance of being interested; that they had determined to dispose of 60,000 shares of the 200,000 shares at \$5 a share. Kuhn agreed to purchase 6,000 shares, and on the 26th Harris informed him he had purchased that amount for him; and the next day Kuhn paid the purchase money in the temporary loan of the United States. On the 26th Evans purchased through his broker, 1,000 shares of the stock, and on the 28th paid for them.

21. The defendants, Maitland, Bayard, Harris, Bell, Bowen, Fox and D'Invilliers are stock brokers and were actively engaged in soliciting purchasers for and selling the stock, on March 24th and subsequently.

22. On the 25th March, Fox informed Borie that he had sold his stock at \$5 a share. Borie said to him that that was all wrong; that the company had not been organized and that there was no stock, and that when Fox sold his stock he wanted his own and that of his friends sold. Borie insisted that the parties should meet that afternoon to determine upon their organization, etc.

23. On the afternoon of the 25th March, Maitland, Bell, Shaw, Fox, Harris, D'Invilliers and Bayard, met at Borie's office. Borie stated the manner in which he had changed the original terms of the purchase, namely, that he and his partners, Wister and Hopkins, were to receive stock instead of cash. They all assented to this change, and they agreed to organize on the basis of a charter owned or controlled by Wister, with a capital of \$1,000,000, divided into 200,000

shares at \$5 each; and it was agreed that \$50,000 should form the working capital of the company when it was organized.

24. At this meeting Maitland and Bell informed Borie that they had sold all or nearly all of their stock. He claimed that all the parties in interest should have a proportionate interest in the sales, and that all their stock should be sold for joint account; that a committee should be appointed for that purpose, and that all stock sold should be put into their hands, each party furnishing a *pro rata* portion. This was agreed to, and it was resolved to place 60,000 shares in their hands for sale; that number being fixed because that number had been already sold.

25. Borie advised that a printed form of receipts should be prepared and given to each purchaser—that mentioned in the bill as having been given to Evans.

26. Next day sales of nearly 100,000 shares having been reported, the same parties again met and increased the number of shares to be offered for sale to 100,000; and further that the balance of unsold stock should be locked up in the hands of the committee not to be sold for one year without the consent of three fourths of the party in writing.

27. Meantime Wister, with the knowledge of Borie and Hopkins, procured the passage of the act of March 28, 1864.

28. On the same 25th March, Borie notified the parties who had agreed to purchase to pay him fifty per cent. of the purchase money, as security that they would carry out their agreement to purchase. Harris & Co. on the 25th of March paid \$10,000 on account of their share of the purchase, Bayard \$5,000, Bell \$10,000, and Trotter \$5,000; and on the same day Borie lent to Harris & Co. \$10,000, to Bayard, \$5,000 and Bell, \$10,000. On the 26th of March Bowen and Fox paid to Borie, \$10,000; D'Invilliers, \$10,000; Maitland, \$10,000; Shaw, \$10,000; Lewis, \$5,000; Bartlett, \$5,000; A. E. Borie, \$5,000; Hopkins, \$3,750; Wister, \$3,750; C. L. Borie, \$3,750, and H. P. Borie, \$3,750; and on the same day Borie lent to D'Invilliers \$10,000; Lewis, \$10,000; H. E. Borie, \$5,000; Hopkins, \$3,750; Wister, \$3,750; C. L. Borie, \$3,750, and H. P. Borie, \$3,750. The apparent payments to Borie by Harris & Co., Bayard, Bell, D'Invilliers, Lewis, Bartlett, A. E. Boire, Hopkins, Wister, C. L. Borie, H. P. Borie, were not actual pay-

ments, but were of sums of like amount lent to them at the time of payment by H. & C. Borie.

29. At the meeting on the 25th of March, Borie was appointed treasurer "to receive and deliver the stock" to Maitland and receive from him the proceeds. Maitland sold 100,000 shares of stock and paid to Borie on March 29th, \$200,000, and on the 9th of April, \$250,000. He retained in his hands \$50,000 by the agreement of the parties, to be used by him, under the instructions of their committee, in the purchase of such of the stock as they might judge expedient. Borie held the \$200,000 for payment for the property when the proper conveyances should be executed; and on April 5th he paid Lewis \$150,000 and Tatham \$50,000.

30. The sum of \$250,000 paid to Borie on April 9th was divided among the parties according to their respective interests. That is to say, there was paid to E. T. Shaw, \$12,000; Harris & Co., \$12,000; Maitland & Co., \$12,000; John P. Bell & Co., \$12,000; C. D'Invilliers, \$12,000; Bowen & Fox, \$12,000; C. P. Bayard, \$6,000; George Trotter, \$6,000; George T. Lewis, \$6,000; N. Bartlett, \$6,000; A. E. Borie, \$6,000; E. M. Hopkins, \$31,166.66; C. Wister, \$31,166.66; C. L. Borie, \$4,500; H. P. Borie, \$4,500; C. & H. Borie, \$26,666.86; the Keystone Zinc Company, \$50,000, to pay for the subscriptions by C. & H. Borie, E. T. Shaw, E. V. Maitland, John P. Bell, Bowen & Fox, C. P. Bayard, C. D'Invilliers, Harris & Co. and Charles Wister, each for 1,000 shares, except Wister, who subscribed for 2,000. These payments were made April 9, 1864.

31. At a meeting of the corporators of the Keystone Zinc Company, held April 6th, the act of incorporation and the supplement were accepted. Books were opened for subscriptions for the capital stock, when C. & H. Borie, E. T. Shaw, E. V. Maitland, John Bell, Bowen & Fox, C. P. Bayard, C. D'Invilliers and Harris & Co. each subscribed for 1,000 shares, and Charles Wister for 2,000. The subscription price for these shares, namely \$50,000, was paid by Mr. Borie as mentioned.

32. These stockholders met on April 7th and resolved that the original stock of the company "be divided into one hundred thousand shares at \$5 per share." They elected a

president and directors, all of whom were among the purchasers of the land. At an adjourned meeting next day it was resolved to increase the capital stock to two hundred thousand shares, and that the directors be directed to purchase, for the purposes contemplated in the charter, the real estate sold by Lewis and Tatham, to pay for the same the sum of \$200,000, with one hundred and ninety thousand shares of the capital stock, which shares the directors were authorized to transfer to the vendors of the land.

33. The directors met the same day and authorized the president of the company "to effect the said purchase on the terms proposed, and to transfer the said stock," etc. At a meeting of the board on April 23d, the president reported "that he had executed the necessary deeds, etc., for the purchase."

34. On April 8th there were issued the certificates of stock to the subscribers for the 50,000 shares, as mentioned in 31st paragraph. At the same time there were issued to C. & H. Borie two certificates, one for 100,000 shares and one for 90,000, in payment for the land and leases.

35. The shares so delivered to C. & H. Borie were thus disposed of: 100,000 to E. V. Maitland, 7,000 to Harris & Co., 7,500 to E. V. Maitland, 7,000 to John P. Bell, 8,500 to C. D'Invilliers, 7,000 to Bowen & Fox, 3,000 to C. P. Bayard, 9,667 to E. M. Hopkins, 40,333 to C. & H. Borie. The delivery of this stock to C. & H. Borie was in fact in trust for the parties who had subscribed to pay for stock or shares before the organization of the company, and also for C. Borie's co-purchasers' shares, in part of their profit on the resale to the corporation.

36. Of the money received by Maitland after he had paid Borie \$450,000, he retained \$50,000 for the purpose of speculating in the stock, at the discretion of the trustees named for the purpose at the meeting of the 25th of March. The profits on the speculation when the account was closed were paid to the parties, namely: to Shaw, Bell and Bowen & Fox \$1,284 each; D'Invilliers and Harris \$1,027.20 each; C. & H. Borie \$6,163.20; Bayard, \$513.60; Maitland, \$1,027.20.

37. The parties who signed the agreements of March 24th received \$250,000, the balance of the \$500,000 received by

Maitland after paying for the property and retaining \$50,000 for the purpose of speculation; and \$13,610.40, the profits from the speculations with the \$50,000; and ninety thousand shares of stock; on all this they did not pay a dollar.

38, 39. The actual subscribers or purchasers received their certificates of stock from or through Mr. Maitland out of the 100,000 shares assigned and transferred to him for that purpose; they were not informed of the meeting at which the company was organized, nor were they present at it, nor at that at which it was determined to buy the property from Borie.

40. The parties who purchased the stock or shares were never precisely informed what they bought. They never inquired. If they had, inquiry would probably never have ended in knowledge, for the sellers were as ignorant as the purchasers; some of them have testified that they did not know, themselves. Both believed they were buying and selling into a speculation, and that sufficed to satisfy them.

41. Mr. Kuhn, in the fall or winter of 1864-5, inquired of Harris why a meeting of the stockholders was not called, in order that the parties interested might ascertain what was doing, and the reply he received was that there was nothing to tell. On the 3d October, 1865, however, there was a meeting of stockholders, which Mr. Kuhn attended; he testified that a report from a committee which had been appointed to investigate the affairs of the company was read, "of such a damaging character to the concern and those having the management of it that I at once determined to take legal measures for the recovery of my money, which I considered had been improperly made use of." Mr. Kuhn "very shortly after" called on counsel, and informed him of his determination, and retained him to commence suit. His counsel informed him that a suit had been instituted by other parties; that their case was similar to his, and that a decision in that would determine his, and advised delay until the determination of the existing case. In this advice Mr. Kuhn acquiesced. Mr. Kuhn's counsel testified he did not bring suit "because he had no instructions to do so," and because he believed his recommendation to him that he should await the issue of pending suits seemed to have his acquiescence.

42. An act of the General Assembly, approved March 21, 1865, authorized the corporation to borrow not exceeding \$200,000, to issue bonds therefor, and to secure their payment by a mortgage of their estate and franchises; and at a meeting of the stockholders, held October 17, 1865, it was determined to submit the question of the acceptance or rejection of this supplement to a stock vote. As the result of this vote the supplement was accepted. Mr. Kuhn and Mr. Evans voted in the negative. Mr. Wells and Mr. Kenney did not vote.

43. The minutes of the corporation, under the date of May 19, 1871, contain the following entry: "Joseph Maitland, Esq., president, reported verbally that the works had not been in operation during the last year, and therefore had nothing to communicate relative to the details of the works further than may be found in the treasurer's accounts herewith submitted. He further reported that a judgment had been obtained against the company at the suit of parties who had loaned the money necessary for the building of the works, and that the leases and personal property had been levied upon and sold, on the 19th of January last, under that judgment. He further stated that, having exhausted all the personal property, they had now levied upon the real estate, and it would be sold for the balance of their judgment between this time and July or August next."

44. Mr. Charles Borie being asked, on his examination, what was the present condition of the property, replied: "It has all been sold; farm, personal property and leases—all the property of the company—on judgments obtained by creditors." These creditors were parties who had loaned money to the corporation, namely, E. T. Shaw, George Trotter, C. P. Bayard, Bowen & Fox, E. H. Hopkins, C. & H. Borie, C. D'Invilliers, E. V. Maitland, George T. Lewis, Charles Winter, A. E. Borie and John P. Bell. Their claims amounted in the aggregate to \$34,000. Mr. Borie also testified that the property was bought in for the creditors.

45. The sheriff deed is made to Frank W. Paul, Esq., who has executed a declaration of trust, reciting that the purchase money recited in the sheriff's deed to have been paid, was paid by Charles L. Borie, and declaring that he held the property in trust for him, to be conveyed as he shall direct.

46. There is no evidence showing the cause of the company's insolvency.

The report of the master proceeded:

"*Densmore Oil Co. v. Densmore*, 14 P. F. Smith, 43, decides that there are two principles applicable to all partnerships or associations for a common purpose of trade or business.

"1. That any man or number of men, owners of property, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. The latter are in no better position than strangers. They must exercise their own judgment as to the value of what they buy.

"2. That where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation with each other and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such company and then sell it at an advance, without a full disclosure of the facts. They must account to the company for the profit, because it is legitimately theirs.

"Within which of these two propositions does the conduct of the defendants fall?"

After giving a synopsis of the facts, he proceeded:

"Whatever may have been Mr. Borie's position when he agreed to buy from Lewis, yet, after he bought and associated with the other subscribers to the paper of March 24th, he and those he represented united with them in beginning or starting the project of an association; and one of the professed objects of the parties was to sell the property to the projected company at an advance on the price at which they purchased it.

"This is the very case of *McElhenny's Appeal*, 11 P. F. Smith, 188. There it appeared that McElhenny was the owner of certain land supposed to contain oil. He offered it for sale to parties at the sum it cost him, namely, \$12,000, and a share of the profits to be made by the purchasers from him in case they put it into a company at the sum of \$40,000. He sold

to an association on these terms. After the contract with and sale to his vendees, he associated with them as purchasers at \$40,000, on which to form a company. 'Thus,' say the court, 'they became buyers and sellers to and for the company. The rule seems to be settled, in numerous cases, that the promoters of such companies, when they buy to form a company and their purchases are taken by the company, they can not make profits on these sales.'

"In this case the court decreed that McIlhenny's estate should pay a sum equal to the profits received by him from the company in the sale to it by the promoters.

"The actual formation of the company by the defendants is thus shown by the testimony."

The master then stated the testimony as before given, and proceeded:

* * * "Mr. Borie in this answer says, and it is also shown by the testimony, that he stipulated for a profit of \$50,000 for himself, Hopkins and Wister, on the resale of the land, and that this was afterward so changed that in lieu he agreed to receive 40,000 shares in the projected company, which, at the price of \$1.25 per share, would equal his stipulated profit. But the evidence shows that Borie, Hopkins and Wister received in money as their share of profits more than \$93,000 besides over 50,000 shares of stock. The receipt given to the subscribers to the stock was, on its face, a declaration that they were subscribers to the stock of a company, and that their money was to go into the treasury of the company. The sale and purchase by the directors of the company, by and from themselves for the company, at a price beyond which they paid, is beyond all question 'a transaction so incorrect that it is quite impossible that any court of justice could permit it to stand.'

"The master has no difficulty in arriving at the conclusion that, under the authorities, the defendants would, in a proper suit if brought within a proper period, be liable to account for the profits they have made.

"The bill filed is substantially a corporation bill. This was asserted by the defendants and conceded by the plaintiffs. The latter in their bill aver that the defendants own or control the defendants' corporation; that some of them are direct-

ors or officers, and in that way manage and direct the company, and neglect' and refuse to take any measures, or permit the company to take any, against themselves, for obtaining the relief which the plaintiffs seek.

"The corporation in its answer denies the equity of the bill, and asserts that the matters set forth in its answer are sufficient to justify the refusal to institute any such suit as the plaintiffs require. * * * "As it is an axiom that a court of equity jurisdiction 'will relieve against every species of fraud,' the master reports that if the individual defendants shall be finally found liable, the decree should be that they pay the amount of their profits to the corporation.

"But an important question yet remains to be considered, and that is whether the plaintiffs by their laches have not deprived themselves of all claim to relief.

"'It is a principle in equity,' says Lord Selborne in *Ayerst v. Jenkins*, Law Rep. 16, Eq. 275, 'that long delay in seeking to rescind a transaction originally voidable, on the faith of which other parties have irrevocably made their arrangements in life, may operate as a bar to relief.'

"In the winter of 1864-5 Mr. Kuhn, being informed that something was wrong in the organization or management of the company, urged one of the directors (Harris) to cause a meeting of the stockholders to be called, that they might have an opportunity of inquiring into its affairs. At such a meeting, in 1865, he learned that which was, he says, 'of such a damaging character to the concern and those having the management of it, that he at once determined to take legal measures for the recovery of his property,' which he considered had been improperly used. He called on counsel to commence suit, and the delay which occurred was in consequence of his advice. The reason given for such advice was 'that there had been a suit commenced by other parties; that (his) case was similar to theirs; that as their suit terminated favorably or unfavorably so would (mine), and that there was no use for (me) to bring suit, as a decision in that case would determine my own. The testimony of Mr. Kuhn's counsel is, that he did not proceed because he had no instructions to do so, and because he believed that his 'recommendation to Mr. Kuhn that he should await the issue of the suit mentioned had his

acquiescence.' The suits referred to were actions on the case.

"There has been no evidence on the subject of the delay in proceeding on behalf of Evans, Wells and Kenney, the other plaintiffs.

"The bill in this case was filed March 19, 1870, five years and over from the time Mr. Kuhn determined to take legal measures to recover his money.

"Laches and neglect are always discountenanced. Nothing can call a court of equity into activity but conscience, good faith and reasonable diligence. That court can not define the time of bar by a positive rule; it must be governed by circumstances. It refuses relief to stale demands, even in cases where no statutable limitation exists.

"The question of what length of time will bar the assertion of a constructive trust was considered in *Ashhurst's Appeal*, 10 P. F. Smith 290. In this case it was said by the judge at Nisi Prius, 'but what is the reasonable time within which a constructive must be asserted? The cases do not clearly define it, and perhaps it is incapable of strict definition. It must vary with the circumstances of each case. For myself, I think it may be safely laid down that where a party claims to hold another a trustee of personal property under a constructive trust, that he must assert the claim within six years from the time when the trust is alleged to have originated. In analogy to the Statute of Limitations he can not be permitted to make the assertion afterward. This, I think, should be regarded as the general rule. There may be cases where even six years can not be allowed, as when a party, having a right to set aside a transaction, or treat it as a trust, stands by and sees another dealing with the property in a manner inconsistent with any trust, and makes no objection. And so when the rights of third persons may have intervened. So, also, where the property is of a peculiar kind, and the alleged trustee, in ignorance of any intention to hold him to an account, relying on his ownership, enters upon a hazardous business or incurs large responsibilities. At least this is true when the alleged constructive trust does not grow out of actual or intended fraud. It has often been said that equity obeys the Statute of Limitations, and it has been held that laches for a much shorter period than six years, aided by other circumstances will bar a right.'

"These principles were applied to that case, and the plaintiff was held to be barred because his bill was not filed until seven years and four months after his right to sue, if he had any, came into existence. This decree of the judge at Nisi Prius was affirmed by the court in banc, the opinion declaring that the court were unable to discover error in any of the conclusions arrived at by the judge below. This case, therefore, must be taken to have decided that laches for a shorter period than six years, aided by other circumstances, will bar a right in equity.

"The meeting of the stockholders at which Mr. Kuhn learned that which determined him to bring suit to recover the money which he had paid for stock, was held October 3, 1865. At a meeting held October 17th in the same year, he and Mr. Evans were present and participating in the proceedings by voting their stock against the acceptance of an amendment to the charter of the company, which authorized it to borrow money, issue bonds, and secure them by a mortgage of the estate and franchises of the corporation. At this meeting a resolution was offered authorizing the directors to borrow on the security of such a mortgage. The amendment to the charter and the resolution were both adopted by the vote of a majority of the stockholders, who also held a majority of the stock.

"This conduct of these two parties was inconsistent with any intent to proceed against the defendants, who were the directors of the corporation, in such a manner as would disorganize and cripple the company in whose prosperity they had so large an interest.

"The managers of the company seem to have fairly and honestly endeavored to manage its affairs for the advantage of the stockholders. They borrowed money, themselves being the lenders, not, however, under the authority of the amendment for the purpose of constructing works, etc. And all this was done without interference or objection by any of the plaintiffs. The application to counsel made by Mr. Kuhn was not known, so far as appears, to the defendants.

"The master reports that the bill should be dismissed, each party to pay his own costs."

Exceptions were filed with the master by both parties. The fifth of the plaintiff was:

"The master errs in reporting generally that the bill should be dismissed, whereas the reasons he gives for such dismissal only apply to two of the complainants."

As to this exception the master reported:

"I omitted to report why I considered that the bill as to Wells and Kenney should be dismissed. These parties knew of the matters complained of as entitling them to relief in 1865, and they did not become parties to the bill until 1872. They were therefore outside of the statutory time of six years. They could not at the latter period have filed a bill originally.

"It has been argued with earnestness that they are to be considered as being parties to the bill at the time it was filed in 1870. And for this authorities have been cited. These are to the effect that a bill filed by a creditor on behalf of himself and others, will prevent the running of the statute as to those not named, and that a creditor who comes in during the progress of a suit, which has been instituted by one creditor on behalf of himself and others, is to be considered in the light of a plaintiff, as if the bill had been filed in his name: *Stern-dale v. Hankinson*, 1 Simons, 393; *O'Kelly v. Bodkin*, 2 Irish Eq. 369. But these cases were cases of creditor's bills—proceedings not known in Pennsylvania. The claims were claims *ex contractu*. No similar decision has been shown in a case where the bill was filed on behalf of *cestuis que trust* claiming under a constructive trust. I am, therefore, unable to conclude otherwise than that Wells and Kenney are to be considered parties only when they came by their petition in 1872."

With some unimportant alterations the master overruled all the exceptions.

At Nisi Prius, December 22, 1874, the exceptions to the master's report were overruled, and it was decreed that the bill be dismissed, each party to pay their own costs.

EVANS and KUHN appealed to the court in banc.

They assigned for error.

2. Dismissing the complainant's bill.

4. Not sustaining complainant's second exception, viz.:

"Reporting that the presence of Messrs. Kuhn and Evans,

two of the plaintiffs, at the meeting of October 17, 1835, and their voting against the acceptance of the amendment to the charter authorizing it to borrow money, issue bonds and secure them by mortgage of the estate and franchises of the corporation, was conduct inconsistent with any intent to proceed against the defendants, who were the directors of the company, in whose prosperity they had so large an interest, and therefore reporting that the bill should be dismissed."

5. Not sustaining complainants' third exception, viz.: "Reporting, when he had already in effect reported, that these very directors, at the time of that meeting, had in their hands large sums of money applicable to the very purpose for which at that meeting it was resolved to raise money by mortgaging the company's property, and which sums were fraudulently withheld from it by them; and the presence and votes of said plaintiffs at that meeting were exactly in the line of and in accordance with their present suit, the object of which is to put into the treasury of the company funds to pay its debts and continue the developments of its mineral property; that is, their votes were to prevent the raising of the money by mortgage, when the defendants owed the company more than was needed."

6. Not sustaining complainants' fourth exception, viz.: "In so reporting, because instead of an intent to proceed against the defendants as directors of the company in a manner to disorganize and cripple it, the suit intended and now brought was and is a suit to put the company in a prosperous condition, by bringing into its treasury from the pockets of the individual defendants large sums which properly belonged to it."

7. Not sustaining complainants' fifth exception, viz.: "Reporting, generally, that the bill should be dismissed, whereas the reasons he gives for such dismissal only apply to two of the complainants."

8. Not sustaining the plaintiffs' sixth exception, viz.: "Reporting that the managers of the company seem to have fairly and honestly endeavored to manage its affairs for the advantage of the stockholders, after, in effect, reporting that they were all the time fraudulently withholding from the company many thousands of dollars to which it was entitled,

and while so withholding said moneys had sneed the company for alleged loans, had its property sold by the sheriff, and had bought it in for themselves."

9. Not sustaining complainants' seventh exception, viz.: "Reporting that the sums which defendants allege they lent to the company were really sums borrowed by the company from them individually, when he had before in effect reported that they owed to the company much more than they allege that they lent, and a court of equity would, under the circumstances, treat such alleged loans as payments on account of what they owed."

10. Not sustaining the complainants' eighth exception, viz.: "Reporting that this borrowing and lending was done without any interference or objection by any of the plaintiffs, when there was no evidence of any knowledge whatever of said borrowing or lending on the part of the plaintiffs."

11. Not sustaining the complainants' ninth exception, viz.: "Reporting that the bill should be dismissed, because of the complainants' delay for a period of nearly six years, aided by other circumstances, whereas he should have reported that no circumstances existed to take the complainants' case out of the general rule, and that, therefore, as a bill was filed within six years, the complainants were not barred by this delay."

G. T. BISPHAM and E. S. MILLER, for appellants.

R. C. McMURTRIE and G. W. BIDDLE (with whom was J. W. PAUL), for appellees.

Mr. Justice MERCUR delivered the opinion of the court, May 8, 1876.

This is substantially a corporation bill. It was filed by Evans and Kuhn, who are stockholders in the Keystone Zinc Company. Some two and a half years thereafter the bill was amended by adding two other stockholders as complainants.

The ground of complaint is that in the formation of the company both the defendants and the plaintiffs were associated together; that the defendants purchased certain mineral lands

and sold them to the corporation of which they were directors, for a sum many times greater than they actually paid for them; that the price they paid was concealed from the plaintiffs, whereby a resulting trust had arisen, and the defendants are liable to account for the profits which they have made.

The master found the evidence sufficient to establish a constructive trust, but reported that the bill be dismissed by reason of the laches of the plaintiffs in filing it. The court confirmed the report and dismissed the bill.

We will therefore consider the sufficiency of the laches and attending circumstances to justify the decree of the court.

In March, 1864, the agreement for the formation of the company was made, and the defendants entered into a contract for the purchase of the land. The necessary act of incorporation was procured in a few days thereafter. Early in the next month the defendants obtained a conveyance of the land and sold it to the corporation, of which they were three directors, and certificates of stock were issued thereon, in pursuance of a resolution of the stockholders. At a meeting of the stockholders, early in 1865, Kuhn swears that he obtained information "of such a damaging character to the overseer and those having the management of it, that I at once determined to take legal measures for the recovery of my money, which I considered had been improperly made use of." With that view he consulted counsel, but in consequence of other persons occupying a similar position, having brought actions on the case, which were then pending, he postponed instituting any proceedings. At another meeting of the stockholders held in October of the same year, Kuhn and Evans were both present and participated in the proceedings. They voted their stock on the question of the acceptance of an amendment to the charter, authorizing the company to borrow money, issue bonds and secure the same by a mortgage on the estate and franchises of the corporation. It is true they voted against accepting the amendment; but that fact in no wise changes the legal effect of their action for the purposes we are now considering it. The amendment was adopted by a vote of the majority of the stockholders, representing a majority of the stock. At the same time a resolution was also passed

authorizing the directors to borrow money on the security of the mortgage.

This bill was not filed until nearly four and a half years after that meeting. If the case rested on the lapse of time alone that would be insufficient to bar the plaintiffs' rights to file the bill.

As a general rule a constructive trust in regard to personal rights or personal property may be asserted at any time within six years after a knowledge of the facts creating it. At the expiration of that time it is barred by analogy to the time fixed by the Statute of Limitations: *Ashhurst's Appeal*, 10 P. F. Smith, 290. But laches for a much shorter time than six years, aided by other circumstances, will bar the right: *Id.*

There is another aspect of this case. The relief prayed for is not that the defendants shall pay anything directly to the plaintiffs, but that they shall pay into the treasury of the corporation, whereby the plaintiffs may be benefited by the increased property of the company. The attempt is to obtain relief through the equitable rights of the corporation. Then the knowledge and conduct of the latter must be considered.

The bill is not to repudiate so much as it is to enforce a constructive or implied contract. The land was conveyed to the corporation, 8th of April, 1863. Nearly six years thereafter the bill was filed. The minutes of the corporation of the same month of April show the facts on which the present complaint mainly rests. The manner in which the certificates of stock were issued, and payment for the lands made, were sufficient to make inquiry a duty of all who were unsatisfied. No steps were taken to establish a resulting trust.

In October following the company accepted the amendment to its charter and authorized a loan, predicated thereon to be made. The plaintiffs had full knowledge of this action, both present and prospective. They instituted no proceedings to prevent it. They acquiesced in it. They thereby encouraged the directors to borrow money in pursuance of the resolution of the stockholders. They thereby induced the defendants to believe that no legal proceedings would be instituted, predicated of the original purchase of the land. Afterward the defendants lent money to the corporation, but not under the authority of the amendment. The master has

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found that the directors "seemed to have fairly and honestly endeavored to manage its affairs for the advantage of the stockholders." Nevertheless the company became embarrassed. Judgments were recovered against it by creditors. All its property, both real and personal, was sold and bought in for the benefit of the creditors. Hence, since the plaintiffs had full knowledge, new business arrangements have been made and other rights have intervened. These proceedings were delayed under the attending circumstances, an unreasonable time. Having been so delayed, the laches is fatal to the plaintiffs' bill. This view is fully sustained by *Ashhurst's Appeal, supra*, and the numerous authorities there cited. Although the transaction was originally voidable, yet having been acquiesced in by the parties who might have avoided it, for a length of time less than six years, but by their conduct having induced the offending parties to believe it was not to be questioned, they are now debarred from avoiding it.

The two other stockholders, who became plaintiffs by amendment, are in a worse condition than the original plaintiffs. Their first action was more than six years after they had full knowledge. This is not a creditor's bill, in which a creditor has come in during the progress of a suit which one creditor has instituted in behalf of himself and others. We are now dealing with a constructive trust. These latter plaintiffs are to be considered as such, with like effect only as if they had filed an original bill at the time they applied by petition to be added to the record as complainants.

Decree affirmed and appeal dismissed at the cost of appellants.

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(41 Michigan, 583. Superior Court, 1879.)

¹ **Delay and allowing expenditure.** A bill was filed to establish a right to profits from a mine and for a division of the property, complainant claiming under a lease of an undivided interest in the mines, the remaining

¹ Ignorance of his legal rights no excuse for gross laches: *Breit v. Yeaton*, 101 Ill. 245.

interest, including the reversion, having long before passed to the defendant. *Held*: properly dismissed for unconscionable delay on proof that complainant, with full knowledge of what was being done, had allowed defendant to expend money and erect costly works to develop the mineral resources of the land, he, the complainant, not asserting his claim in court for more than twenty years after defendant had acquired its original interest in the property.

Appeal from Marquette. Submitted June 13th. Decided October 14th.

Bill for an accounting, division of profits, sale of premises and distribution of the proceeds. Complainant appeals.

F. O. CLARK, DAN. H. BALL and JOHN VAN ARMAN, for complainant.

W. P. HEALY, J. J. STORROW and G. V. N. LOTHROP, for defendant.

There are strong presumptions against a claim which plaintiff has knowingly allowed to sleep for twenty years: *Russell v. Miller*, 26 Mich. 1; *Palmer v. Palmer*, 36 Mich. 486; *Riopelle v. Gilman*, 23 Mich. 35; *Toll v. Wright*, 37 Mich. 102; *Loomis v. Brush*, 36 Mich. 47; and where the claim is a mere usufruct for a limited period its value is constantly diminished by defendant's use of the property: *Huff v. McCauley*, 53 Penn. St. 210.

GRAVES, J.

In 1877 we had before us an action of ejectment by complainant against the defendant corporation for an undivided interest in a mining right bargained by Isaiah Briggs to Robert J. Graveraet in the year 1850, and we then held that whatever view might be taken of other questions the thing sued for was not demandable in ejectment: 36 Mich. 105.¹

After this determination, and in November of the same year, the complainant filed this bill to obtain the judgment of the court in equity on the justice of his claim under said mining grant against the defendant, and on final hearing on pleadings and evidence the bill was dismissed, and an appeal was then taken by complainant.

¹ 9 M. R. 47.

The controversy was fully and ably discussed on the ejectment record, and has been again debated forcibly and critically in its present aspect.

Several of the leading transactions are noticed in the report of the ejectment case, but a clearer view will be obtained of the shape the litigation has now assumed and of the case the complainant has undertaken to establish, if we recall several of the prominent facts in connection with the scheme of the bill.

In substance, the bill states that on the 5th of March, 1849, Fisher, Clark, Graveraet and complainant joined together as partners under written articles, which are set forth, to mine and manufacture iron in Marquette county under the name of the Marquette Iron Company; that in August following Clark died, but the three survivors, by mutual consent, perpetuated the copartnership with the same name and articles; that Isaiah Briggs had pre-empted the southwest quarter of section ten, in township 47, north, of range 27, west, in Marquette county, and on the 28th of September, 1850, made the required proof and paid the purchase price to the United States and received a receipt therefor, and on the same day granted to Graveraet a lease of the undivided half of the tract for mining purposes, and that Graveraet at the same time assigned the lease to the firm. The lease and assignment are set out at length. That on the 1st of December, 1851, the United States patented the land to Briggs in accordance with the pre-emption right; that this lease continued to belong to the firm known as the Marquette Iron Company until August 20, 1852, at which time Graveraet retired and a division and distribution of the assets were made, Graveraet granting to Fisher and complainant all his interest in the firm property, including the mining right, except in certain parcels of realty turned over to him and having no connection with that right. The grants on both sides are set forth. That in 1853, the defendant corporation acquired and still holds all the interest, legal and equitable, in said mining tract, and including the reversionary right which remained in Briggs on his grant to Graveraet, in 1850, of said privilege; that Graveraet's assignment of 1852 to Fisher and complainant rendered them tenants in common of the mining right; that they so held it

until June, 1855, at which time Fisher granted his undivided half to the Cleveland Iron Mining Company, and which in turn granted it to defendant, September 29, 1863. But that complainant has retained his part and remained half owner up to the present time. That complainant notified defendant of his ownership before the latter purchased the Fisher half-interest and before it began making improvements and mining on the premises; that the defendant entered, however, under its purchase of the title and estate existing outside of the lease and prosecuted mining, and after its acquirement of the Fisher half-interest continued operations under that title.

The essence of the claim is that the mining privilege so created by the grant from Briggs to Graveraet on the 28th of September, 1850, and by Graveraet assigned to the firm on the same day, has always since Graveraet's retirement from the firm in August, 1852, and his assignment at that time of his interest to Fisher and complainant, been in the joint ownership of two parties, and that complainant has always been one of them. That during the period from August, 1852, to June, 1855, Fisher was the other part owner. That at the last date the Cleveland Iron Mining Company succeeded to his title and retained it until September, 1863, at which time the defendant corporation obtained it, and has since held it. That from the acquirement of the main title in 1853 the defendant has invariably asserted and maintained an exclusive right in the premises and refused to acknowledge any right in complainant under said mining grant. That the division of interest has not been in the thing owned, but in the ownership of the thing.

Although in the view to be taken it is not material, the fact is noticeable that when Briggs gave the so-called lease to Graveraet he was not owner of the land, and so far as appears, not able to confer the privilege described and might never be, and that he expressly postponed the taking effect of the instrument until his pre-emption claim should be confirmed; whilst the only evidence the case exhibits of a confirmation is the emanation of the patent, which was not till December 1, 1851, a year and two months after the execution of the lease to Graveraet and his assignment to the Marquette Iron Company, and several weeks after the conveyance from Briggs to Burt, through which the defendant holds.

The only title and interest asserted by complainant are traced to this so-called lease, and whatever may have been the legal or equitable value of such title and interest, he must have acquired them as early as August, 1852, the date of Graveraet's retirement from the Marquette Iron Company and his assignment to Fisher and complainant, and there is no intimation in the bill of any entry or offer to make entry, or of any steps toward the exercise of right on the territory under said instrument either by complainant or the Marquette Iron Company, or even of any use or occupation of the land or any part of it by any party adversely to defendant. No disability is set up or pretended.

In August, 1875, a suit in ejectment was brought and dropped. A second ejectment was then prosecuted to an adverse judgment here as already mentioned. No other legal proceedings seem to have been taken.

The statements about engaging counsel would be unimportant if, as is not the case, they were borne out by the evidence.

For more than twenty years next preceding the first ejectment, the defendant was notoriously in possession of the territory in question and asserting exclusive ownership. In order to find out what mineral resources there were and to what extent they would justify outlay, and what methods would be most expedient if not indispensable, the corporation made large expenditures and took serious risks, and as the earlier ventures proved successful and the workings and explorations disclosed the underground conditions and the mineral riches there, and from time to time suggested new and further improvements and appliances to fully utilize them, the company made the desired changes, and in the course of years these various and successive additions and alterations resulted in the establishment of very extensive works at the cost of a great amount of capital.

The complainant resided in the neighborhood and was a spectator of what was going on. He knew what the company claimed and what its position was. He knew that its stock was changing hands from time to time and that the purchasers were not informed of his claim. He knew it was getting credit on the faith that it owned the entire estate. He also

knew that the constant drain was steadily exhausting the ore and surely depreciating the property.

None of these considerations nor all of them together, were sufficient to prompt complainant to exhibit his claim in a court of justice. An opportunity was offered by Graveract, who filed a bill against him to contest his right to the very interest he now asserts, but he studiously remained silent. In the meantime the statute was wearing away whatever troublesome liabilities of the old partnership concern may have survived the bankruptcy of Fisher, and moreover, the persons who were privy to the set of transactions from which it is sought to isolate and preserve the claim made by this bill were passing off by death. A large number have gone, including Heman B. Ely¹ and Graveract. That these persons would not be able, if now living, to furnish explanations which are wanting, can not be assumed.

The ground of objection we refer to in complainant's case is pleaded by the answer, and it is vital. The only attempt worthy of notice to parry its effect by new matter was the introduction of evidence to show a fugitive entry by complainant in 1857, and marked by the putting up and brief occupation of a log shanty. This would hardly deserve the importance complainant seems to have attached to it, if it were authorized by the bill. But, as already shown, there is no foundation for such proof in the case there stated, and it can not be regarded at all.

The cause is distinctly subject to the principle which, according to previous decisions of the court, disentitles the party to the aid of equity. There has been unconscionable delay.

The more than neglect for so many years to bring forward any claim in court when so many interests and transactions about him and connected with him were urging him to do so then, if ever, and when, as he knew, the constantly increasing changes were multiplying what would be grounds of wrong to others in case his claim should finally prevail, and where, too, as he also knew, the truth was growing more and more inaccessible by the death of witnesses, the infirmity of human

¹ Defendant claims title to the disputed premises by warranty deed from Heman B. Ely.

memory and the accidents which happen to written muniments, can not be waived by a tribunal which has for one of its chief maxims that nothing can call it into activity but conscience, good faith and reasonable diligence.

The established conception of the doctrine and the conditions demanding its application will find sufficient illustration in the following cases: *McLean v. Barton*, Har. Ch. 279; *Campau v. Chene*, 1 Mich. 400; *Newberry v. Detroit and Lake Superior Iron M. Co.*, 17 Mich. 141; *Jenny v. Perkins*, Id. 28; *Russell v. Miller*, 26 Mich. 1; *McVickar v. Filer*, 31 Mich. 304; *Ritson v. Dodge*, 33 Mich. 463; *Loomis v. Brush*, 36 Mich. 40; *Webster v. Gray*, 37 Mich. 37; *Bond v. Hopkins*, 1 Sch. & Lef. 413; *Clegg v. Edmondson*, 8 DeG., M. & G. 787; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607; *Castner v. Walrod*, 83 Ill. 171; *Royal Bank of Liverpool v. Grand Junction R. R.*, 125 Mass. 490; *Brown v. County of Buena Vista*, 95 U. S. 157, 159, 160, 161; *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S. 806; *Harwood v. R. R. Co.*, 17 Wall. 78; *Bowman v. Wathen*, 1 How. 189; *Wagner v. Baird*, 7 How. 234; *Twin-lick Oil Co. v. Marbury*, 91 U. S. 587, 591, 592, 593; *New Albany v. Burke*, 11 Wall. 96; *Bolton v. Powell*, 15 E. L. & E. 32.

As we are satisfied this ground of objection is conclusive against the complainant, it is unnecessary to speak of other points which might lead to the same conclusion.

The decree must be affirmed with costs.

MARSTON and COOLEY, JJ., concurred; CAMPBELL, C. J., did not sit in this case.

RULE V. JEWELL.

(Law Reports, 18 Chancery Division, 660. High Court of Justice, 1880.)

¹ **Laches may confirm irregular forfeiture.** At a meeting of the partners in a cost book mine in 1874, it was stated that the mine was £2,003 in debt, and a call of £25 was made upon each of the six shares of the

¹ *Taylor v. Holmes*, 14 Fed. 498; *Livingston v. Salisbury Ore Bed*, 16 Blatchf. 549.

mine. Two of the partners did not pay this call and were in arrear for other calls. At subsequent meetings in June, 1874, the shares of these two partners were declared forfeited. The mine was still in debt in 1878. The owners of the forfeited shares took no steps until July, 1879, when they made a claim, and in September, 1880, they brought their action claiming that the shares had been irregularly forfeited and that they were still partners.

Held, that even assuming the shares to have been irregularly forfeited, the plaintiffs, after such delay, under such circumstances, could not successfully assert their claim to be partners.

Clarke v. Hart, 6 H. L. Cases, 633, distinguished.

Under an agreement made on the 11th of January, 1871, Joseph Rule and John T. Rule, the plaintiffs, and J. H. Jewell and W. J. Hocking and one Edward Wilkins (who afterward assigned his interest to Hocking), became partners in a Cornish mine worked on the cost book principle, the undertaking being held in six parts or shares, to two of which Joseph Rule and J. T. Rule were entitled. In May, 1874, a meeting was held, when the account showed a balance of £2,003 against the mine, and a call of £25 a share was made. At the same meeting it was resolved that all shares on which arrears of calls should remain due on the 8th of June, should be forfeited. The resolutions were signed by Hocking, Wilkins, and J. H. Jewell. Joseph Rule and John T. Rule did not pay these calls of £25 when due, and it was said that money was due from them on a previous call. At a meeting held on the 9th of June, it was resolved that their shares be forfeited. This resolution was confirmed at another meeting held on the 24th of June, but there appeared to have been irregularities in the meetings. There were meetings in 1875 and in 1878, at which further calls were made, but nothing further was done by either of the plaintiffs until July, 1879, when they made a claim to their shares. On the 3d of September, 1880, they commenced this action, alleging that the calls had been irregularly made, that the proceedings at the meetings were irregular, and that their shares were not forfeited, and claiming to be partners in the mine with the defendants, J. H. Jewell and W. J. Hocking.

The statement of defense alleged that the shares of the plaintiffs had been regularly forfeited, and that from 1874 to 1879 the mine had been a losing concern, as the plaintiffs

well knew, and that it was only owing to the extraordinary rise in the price of tin in the latter part of the year 1879 that the mine had become valuable, and the defendants claimed the benefit of the Statute of Limitations.

RIGBY, Q. C. and CHADWYCK HEALEY for the plaintiffs.

The power of forfeiting shares is *strictissimi juris*, and if it has been irregularly exercised, mere acquiescence will not bar the claim: *Clarke v. Hart*, 6 H. L. C., 633. In *Prendergast v. Turton*, 1 Y. & C., Ch. 98; on appeal, 13 L. J. (Ch.) 268, the circumstances were different. Here the meeting was irregular, and due notice of the forfeiture was not given: *Clements v. Hall*, 2 DeG. & J., 173; *Garden Valley United Quartz Mining Company v. McLister*, 1 App. Cas. 39; *Norway v. Rowe*, 19 Ves. 144.

If the mine was so much in debt, the call was absurd, and it was in fact made merely to get rid of the plaintiffs. If it appears that the defendants have advanced money and have thereby made the mine profitable, the plaintiffs may be put upon terms. They were legally partners, and must remain so unless they are shown to have been properly removed.

Witnesses were examined to prove the allegations made in the statement of claim and by counsel. The effect of the evidence is stated by his lordship in the judgment. It appeared that though by calls and otherwise the balance had been reduced, there was, in 1878, a balance of £926 against the mine.

HIGGINS, Q. C., and NORTHMORE LAWRENCE, for the defendants, were not called upon.

KAY, J., after stating the facts and the manner in which, on the evidence, the calls appeared to have been made and the forfeiture appeared to have been declared, continued:

Now, the first question is whether that was a proper forfeiture of the shares. I have not heard the other side, but it seems to me that it was not a proper and regular forfeiture of the shares, according to the provisions of the Stannaries Acts, and I shall deal with the case as though the forfeiture was in point of law invalid.

Then I have to consider what happened afterward. The

Statute of Limitations has been pleaded, but I think it has been truly said that, there having been no valid forfeiture on the 9th of June, the Statute of Limitations could not begin to run against the plaintiffs from that time. They would remain shareholders in law and in equity, if the word "shareholders" be applicable, or they would still remain partners, notwithstanding what was done on that day. Therefore the Statute of Limitations would not be a good plea to their claim to maintain their partnership.

But I have to consider that this was a mining adventure, which is, as Lord Eldon long ago said, *Williams v. Attenborough*, T. & R. 70, a species of trade, and there is a very well settled course of decision, according to which I must now decide; whether these plaintiffs have a right to maintain their present claim after the lapse of time which has occurred between the 9th of June, 1874, about which time they received notice of the forfeiture, and the 3d of September, 1880, when they issued the writ in this action. Now, how is that delay accounted for? I will read from the evidence which has been given by these two plaintiffs themselves. [His lordship then read and commented on the evidence, coming to the conclusion that each of the plaintiffs must have been aware of what had been done, and that neither of them, from June, 1874, until July, 1879, ever made or suggested any claim to be a partner in this concern, or ever offered, nor had either of them now by the pleadings offered, to pay the calls.] In that state of things I have to consider whether this case comes within the well known authority of *Prendergast v. Turton*, 1 Y. & C., Ch. 98; on appeal, 13 L. J. (Ch.) 268, or the later case of *Clarke v. Hart*, 6 H. L. C. 633. [His lordship then stated the facts of the latter case as reported.]

Now, I want to know what similarity there is between the two cases. There is the broad and plain distinction that Hart had a legal interest in the mine. He was one of three lessees of the mine, and, of course, if his share was forfeited, he must have been declared a trustee of that third share for his co-adventurers. I have nothing like that here, as it does not appear that there is anything like legal property in these two plaintiffs. There was also an interval of time very much shorter than occurs in this case. Then the attempted for-

feiture was a conditional forfeiture, not treated as an absolute forfeiture, and three years after that the bill was filed. But in this case I have an interval of time which more than covers the statutory period of limitation, by analogy to which a court of equity generally acts, during which interval no claim whatever was made by either of these plaintiffs upon their copartners; nor was there any offer to pay the arrears of their calls, unless I am to treat a statement which one of them says he made to Hocking, that he should raise an action when he had the means to do it, as being an intimation of the kind. I have not heard the other side, and I do not know what Hocking would say, but I treat that as being anything but such an intimation as was given in the case of *Clarke v. Hart*. But then I am told that a rule is established by that case that if there be a legal interest in a person which has been improperly attempted to be forfeited, then, notwithstanding his lying by for a considerable period, that legal interest is not determined by mere acquiescence; and I am referred to certain paragraphs in the judgments in that case. I will take the most striking of them which occur in the judgment of Lord Chelmsford, 6 H. L. C. 655: "It is necessary to consider a distinction which was suggested during the argument, which must be borne in mind, and which, in my opinion, will reconcile the authorities upon the subject. The distinction to which I advert was that which has been expressed very shortly and very intelligibly by the difference between 'executed' and 'executory interests.' Where a person is obliged to apply for the peculiar relief afforded by a court of equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession, and which may be described as an executory interest, it is an invariable principle of the court that the party must come promptly; that there must be no unreasonable delay; and if there is anything that amounts to laches on his part, courts of equity have always said—We will refuse you relief. With regard to interests which are executed, the consideration is entirely different. There mere laches will not of itself disentitle the party to relief by a court of equity; but a party may, by standing by, as it has been metaphorically called, waive or abandon any right which he may possess and which, under

the circumstances, therefore, a court of equity may say he is not entitled to enforce." Now that means, that with regard even to interests which are executed, a partner may, by standing by, waive or abandon his right. In a later passage Lord Chelmsford comments on *Prendergast v. Turton*, 1 Y. & C., Ch. 98; on appeal, 13 L. J. (Ch.) 268, and says that in that case distinct notice was given to the partner that his shares were forfeited, and he took no steps whatever to assert his interest for a period of upward of nine years. And without in the least degree attempting to throw doubt upon the decision in that case (which I may observe, by the way, was a well considered decision of two great judges, the then Vice-Chancellor Knight Bruce, and Lord Lyndhurst on appeal), Lord Chelmsford contrasts the case before him with that case, and says, 6 H. L. C., 659, that in that case there was not only no such notice given, but there "was quite sufficient to induce him to believe that he still continued to be a partner in the concern, that his shares had never been forfeited, and that therefore there was no necessity for him to do more than assert his rights, as he did in the correspondence which took place between the parties upon the subject of the forfeiture of the shares."

There you have the whole gist of that decision. Lord Chelmsford does not say that even in the case before him, if there had been a standing by for more than six years without any claim or assertion of right whatever, after distinct notice or knowledge that the shares had been purported to have been forfeited, he would not hold the case to come within *Prendergast v. Turton*; still less does he suggest that *Prendergast v. Turton* was not a perfectly good decision and a binding authority. Nor do I find anything in the other judgments which in the least degree alters the view of the law which seems to have been taken by Lord Chelmsford. Lord Cranworth says, 6 H. L. C., 664, "with regard to the declaration of forfeiture said to have been made on the 31st of May, 1850, as a matter of fact, I arrive at the conclusion that no such declaration was ever made." Afterward he says that the result of their acts "amounted to this, that the two other partners, Clarke and Chapman, intimated to Hart that they no longer meant to go on with him. That they considered that

his shares were forfeited. His conduct upon that was this: he said 'I dispute your right, I deny that my shares are forfeited, and you must proceed as you think fit.' Now after that the result was, that if they chose to go on trading, then, according to all the ordinary principles of equity, they were trading on behalf of the partnership." Then again he says that the argument was that "he had lost his right by lying by. Now, for that proposition I can find no authority either in principle or in argument, because the person wrongfully excluded had from the first moment denied their right to exclude him; he had said expressly, I deny your right to exclude me; I shall remain a partner." Lord Wensleydale says, (6 II. L. C., 670): "Now it appears to me that the principle to be deduced from the cases of *Prendergast v. Turton* and *Norway v. Rowe*, 19 Ves. 144 is, that if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they may then deal with it as they please; if his conduct amounts to a representation of that sort he is estopped by it, and can not afterward complain."

In *Prendergast v. Turton*, 1 Y. & C., Ch. 98, a so-called joint stock company was established in 1825 to work a mine, and certain calls were made as to which there was a question whether they were validly made or not. The plaintiffs declined to pay those calls, and there was a delay of nine years, which might be made up to eleven years. The Lord Justice, then Vice-Chancellor Knight Bruce, said (1 Y. & C., Ch. 110): "This is a mineral property; a property, therefore, of a mercantile nature, exposed to hazard, fluctuations and contingencies of various kinds, requiring a large outlay, and producing, perhaps, a considerable amount of profits in one year and losing it the next. It requires, and of all properties perhaps the most requires, the parties interested in it to be vigilant and active in asserting their rights. This rule, frequently asserted by Lord Eldon, is consonant with reason and justice. Lord Eldon always acted upon it, and has been followed by subsequent judges of great knowledge, experience and eminence. Now, in the present case, conceding, for the sake of argument, that the shareholders could not be compelled to contribute beyond £50 a share, and did no wrong in declining to make advances beyond that sum, yet the result of a l

the circumstances of this case appears to have been that the mine could not be carried on without further outlay. The plaintiffs objected to this further outlay, and then a considerable discussion ensued which was substantially concluded in 1828. Some subsequent letters were written, but they did not, I think, materially vary that state of the case;" and then he states that they carried on the concern, that in 1837 affairs began to look better, and he proceeds: "Matters go on in this manner in 1836 and 1837, and it was not till November, 1837, when the result of the struggle had appeared, that, after a profit had been made by the unassisted efforts of those who still adhered to the speculation, the plaintiff and Miss Kent applied for and claimed their shares." That is nine years after 1828, when the discussion as to those calls had come to an end. And he held, upon the ground of the peculiar nature of a mining concern, that the plaintiffs had no right to stand by and wait till it appeared clearly that it was worth their while, and then come and assert their interest in the mine. In that case the interest was just as much a legal interest as in this case. If this be in any sense of the term a legal interest, so it was in *Prendergast v. Turton*, 1 Y. & C., Ch. 98, and there the interest was treated as having been abandoned, if that be the proper word to use, or was an interest which, in the more accurate language of Lord Wensleydale, the plaintiffs were estopped from asserting against a copartner after an amount of delay which I may take to be nine years. That was affirmed by the Lord Chancellor, Lord Lyndhurst, on appeal, 13 L. J. (Ch.) 268, 269. He says: "This court can never sanction this sort of conditional acquiescence. To allow the party to lie by, in a case of this nature, to watch the course of events, to urge his claim, if it should be to his advantage to do so, and to abandon it on a continuance of misfortune and loss, which as a proprietor he must have shared, would be at variance with the plainest rules of justice."

Now, I have no hesitation in saying, looking at these cases and considering carefully the circumstances of each, that the case before me comes very much nearer to *Prendergast v. Turton*, 1 Y. & C., Ch. 98, than to *Clarke v. Hart*, 6 H. L. C. 633. The differences are said to be these: It is said that in

Prendergast v. Turton, the mine was actually worked, for a time, at a loss, and that in this case the mine was not worked at a loss. But I have this fact very plainly proved, that the notice given to these plaintiffs in 1874 was that the balance was £2,003 against the adventurers, and it is stated that in 1878 it was £926 against them. So that the working from 1874 to 1878, if not at a loss, did not clear off the balance against the adventurers. During that time the plaintiffs clearly lay by, and can I have the smallest doubt that if this mine had turned out to be a losing affair, instead of a profitable one, they would never have asserted any claim to be partners? I have not the least doubt of it. I think the lying by here was entirely analogous to the lying by in the case of *Prendergast v. Turton*. It was lying by to wait and see whether the concern turned out sufficiently profitable to make it worth while to assert their claim to be partners; and when they think the time is come when it is worth their while to assert their title, then they bring their action. The time during which they lie by being more than six years, I consider the analogy of the Statute of Limitations to be one which is applicable, as it is impossible to lay down a hard and fast rule what amount of time shall be sufficient in every case.

Looking at all the facts of the case, I am of opinion that that period of over six years, during which no claim was made, was such a lying by as in *Prendergast v. Turton* was treated as a complete estoppel to the plaintiff's right to make such a claim. Whether it is called abandonment or estoppel seems to me to be indifferent. If it were necessary to call it abandonment, I should be quite prepared to hold that what has taken place in this case amounts to abandonment as between the plaintiffs and their co-adventurers of any interest in this concern. I therefore dismiss this action with costs.

1. Laches in standing by and allowing tenants to work mines, a ground for refusing injunction to restrain the working: *Parrott v. Palmer*, 3 Mylne & K. 632.
2. Neglect to file bill for eleven months after breach of contract: *Pollard v. Clayton*, 1 Kay & J. 462; *Post SPECIFIC PERFORMANCE*.
3. Bill for accounting by executors of deceased partner thirteen years after his death: *Tatam v. Williams*, 3 Hare's Ch. 347.
4. Acquiescence by continued mining in joint fraud of vendor and organizers of purchasing company: *Vigers v. Pike*, 8 C. & F. 562; 2 Dru. & W. 1.

5. In a suit by vendor to set aside conveyance of land for fraud, delay short of the Statute of Limitations may be accounted for: *Warner v. Daniels*, 6 M. R. 436.

6. Laches no defense to decree for accounting where the suit was commenced in time, and both parties were equally negligent in letting it lie from year to year: *Wilhelm's Appeal*, 79 Pa. St. 141.

7. Laches especially applicable in cases where the property (oil wells) is subject to rapid fluctuation: *Twin Lick Oil Co. v. Marbury*, 3 M. R. 688.

8. Justifiable delay distinguished from laches: *Stockbridge Co. v. Hudson Co.*, 107 Mass. 323; *Post* RESERVATION.

9. The United States may be bound by the laches of their agents: *U. S. v. Beebe*, 17 Fed. 36. To the contrary (unless the time so long as to justify the presumption that all the witnesses are dead): *U. S. v. Southern Col. Co.*, 1 West C. R. 11.

10. How far delay must go to amount to laches. Acquiescence in nuisance caused by hydraulics held not fatal: *Woodruff v. North Bloomfield Co.*, 1 West C. R. 183.

11. Laches need not be specially pleaded: *Pratt v. California M. Co.*, 1 West C. R. 87.

12. Guarantor escapes by laches in pursuing his principal: *Holl v. Hadley*. 2 Ad. & El. 758.

PRETTY V. SOLLY.

(26 Beavan, 606. The Rolls Court, 1859.)

Construction of statute by the rule that the particular enactment controls the general enactment, and by reference to the context.

Soil. The word *soil* in an inclosure act construed to mean surface.

Vendor unable to pass minerals. Specific performance of contract for sale of land not decreed where the vendor can not make title to the minerals.

Reservation of minerals in Inclosure Act. An Inclosure Act directed allotments for public and specific purposes, and that one fifth should be allotted to the lord of the manor for his interest in the "soil," and that the residue should be divided amongst the commoners to be held in severalty. And it was declared that the lord might enjoy "all mines, minerals, quarries and other royalties," as if the act had not been passed: *Held*, that the lord retained his rights to the mines and minerals allotted to the commoners in severalty.

The defendant agreed to purchase from the plaintiffs a small piece of freehold land, with a cottage erected thereon, which had formerly been allotted by the commissioners under an Inclosure Act of the 45 Geo. 3, c. xcii.

The defendant insisted that the plaintiffs had not shown a right to the minerals, and he refused to complete.

The plaintiffs thereupon instituted this suit for a specific performance; and a reference was made as to title. The chief clerk found that a good title could be made to the allotment, cottage and premises, except as to the mines and minerals, (if any) under them, to which a good title could not be made.

A motion was made by the plaintiffs to vary the certificate.

The question turned on the terms of the act of Parliament, the material parts of which were as follows: It recited that there were (1) common meadows, (2) a tract of waste called Canford Heath, of 9,000 acres, (3) waste lands in Poole, and (4) waste mudlands. That Mr. Arrowsmith claimed to be the lord of the manor, and to be entitled "*to the right of soil*" of and in the lands, subject to the rights of common, etc., and that "it would be advantageous to the several proprietors and persons interested in the said common meadows,

heaths, waste lands and commonable ground, if the same were divided, and specific parts thereof allotted in proportion to the property rights of common and other interests of the proprietors therein;" and the mudlands were allotted, etc. It then appointed commissioners with the usual powers.

By the 14th section, all the expenses of carrying the act into execution were to be paid by a sale of the waste.

By the 17th section the commissioners were to allot to the surveyors of the highways "such parts and parcels of the heath and waste lands thereby directed to be *divided* and enclosed" as they should think proper, "as and for public watering places for cattle, and for stone and gravel pits, sand and clay pits, and for laying and depositing manure and rubbish," and which allotments were forever thereafter to be used by the surveyors of the highways.

The 19th section directed an allotment not exceeding two acres to be made to the corporation of Poole, for supplying the town with water, for the purpose of erecting a conduit head.

The 20th directed an allotment for a turf common for the cottages and tenants within each tithing.

The 21st, 22d, 23d and 24th sections directed allotments "of the waste lands" directed to be "divided" in lieu of tithes.

The 27th section directed the commissioners to allot one sixteenth of the waste lands that should remain unto Edward Arrowsmith, lord of the manor of Great Canford, "in lieu of and in full compensation for his and their right and interest in and to the *soil* of the said waste land respectively, which shall be awarded by the said commissioners to be divided and allotted under and by virtue of this act."

The 28th section directed a certain allotment of the residue to be made to certain corporations in Poole; and the 29th directed the commissioners (after making the above allotments), to "divide, set out and allot" all such parts of the said common meadows and other commonable lands, and also of the residue of the said waste lands, intended by this act to be divided and allotted, as shall in their judgment be fit and proper to be divided, allotted or inclosed, to be held in severalty unto and for the several proprietors thereof, and persons

interested therein, in satisfaction of their rights of, in, over and upon the common meadows, commonable lands and waste lands so to be divided and allotted.

The 58th section was as follows: "And be it further enacted, that nothing in this act shall extend or be construed to extend to prejudice, lessen or defeat the right and title of the said Edward Arrowsmith, his heirs or assigns, trustee or trustees as aforesaid, as lord or lords of the said manor of Great Canford, of, in or to any seignories, royalties, or other manorial rights incident or belonging thereto (other than *and except the right to the soil* of the waste lands, for which a compensation is hereinbefore directed to be made), but that the said Edward Arrowsmith, or the lord or lords of the said manor for the time being, and all persons claiming by, from, under or in trust for him and them, shall and may, from time to time, and at all times forever hereafter, have, hold and enjoy all rents, heriots, forfeitures, services, fines, courts, perquisites and profits of courts, and *all mines*, minerals, quarries and othes royalties, jurisdictions and privileges to the said manor incident, appendant, belonging or appurtenant (except clay and the right to the *soil* as aforesaid), in as full, ample and beneficial a manner, to all intents and purposes whatsoever, as he and they might or ought to have held and enjoyed the same in case this act had not been made."

Mr. R. PALMER and Mr. JOLLIFE, for the plaintiffs, contended, that the word "soil" in the 27th section of the act included mines and minerals, and that the lords being compensated by the allotment directed to be made to them by that section for their right and interest in the mines and minerals in the waste lands, as part of the soil, they must be treated as excepted from the reservation of the lords' rights contained in the 58th section, and consequently, that they belonged to the commoners to whom the waste lands were allotted.

Mr. LLOYD and Mr. HEMMING, for the defendant.

The following cases were cited: *Riddell v. White*, 1 Ans. 281; *Ward v. Cecil*, 2 Vern. 711; *Townley v. Gibson*, 2 Term R. 701; *Micklethwait v. Winter*, 6 Exch. 644.

THE MASTER OF THE ROLLS.

The question in this case arises on the construction of 45 Geo. 3. xcii, and depends on the operation and effect of the 58th section of that act.

The general rules which are applicable to particular and general enactments in statutes are very clear; the only difficulty is in their application. The rule is that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

See *Stunden v. The University of Oxford*, Sir W. Jones, 17; *Bonham's Case*, 8 Co. Rep. 118 b; *Churchill v. Crease*, 5 Bing. 180.

Again, wherever two parts of a statute are contradictory, the court endeavors to give a distinct interpretation to each of them by looking at the context.

The question upon this Inclosure Act arises in this way: the act relates to certain interests of the lord of the manor of Canford. By the 58th section it reserves to the lord of the manor all manorial rights except the right to the *soil*, and enacts that he may thenceforth hold and enjoy all rents, etc., "and all *mines*, minerals, quarries," etc., incident to the manor ("except clay and the right to the soil as aforesaid"), as if the act had not been made.

The question is, whether this clause extends to the interest of the lord in all the lands inclosed under this act of Parliament, or only to a portion of them. If it is expressly stated, in other parts of the act, that the mines and minerals are contained in the enactments before mentioned, and if there are other parts of the act to which this general clause would apply, I should be of opinion that the general clause would not affect the previous particular enactment. It is, therefore, necessary to observe what the act professes to do. It recites, in effect, that there are four different sorts of property to be inclosed, namely, certain common meadow, Canford Heath, land in the town of Poole, and mudland; and the mode in which it deals with them is as follows:

The 12th section gives directions as to how the old inclos.

nres are to be dealt with; the 17th and 19th direct allotments to be made for public purposes, including a conduit head, and the 20th section directs the second allotment for turbarry for the cottagers; and the sections from 21 to 24 direct the third allotments, which are in lieu of tithes.

Then comes the 27th section which directs the fourth allotment to the lord of the manor, in lieu of his right and interest in the soil of the waste lands.

The 28th directs the fifth allotment of certain lands to the town of Poole, and the 29th section directs the sixth allotment of the residue for the benefit of the commoners. Then comes the 58th, or the special saving clause.

The question is, whether the reservation of minerals extends to all the lands inclosed in which the lord has any interest, or is confined to certain, and if so, to what portions of them.

I think I can dispose of the cases cited; none of them are precisely in point. In one case, *Townley v. Gibson*, 2 Term Rep. 701, the mines were not reserved to the lord, and there can be no question that the case would apply, if the words "mines and minerals" were not specially mentioned in the 58th clause, and that the lord's right to them had been disposed of by previous clauses. The 29th section, which directs the allotments to be made to the commoners, and the 27th, which gives compensation to the lord for his right to the soil, are quite general, and it is clear that if the question depended on those two sections alone, they would necessarily include all the minerals; but the 58th clause says, that nothing therein contained shall prejudice the lord's right to the mines and minerals.

It is said that the 58th section does not apply to or include the waste lands when inclosed and allotted to the commoners, because, by the special enactment (the 27th) a compensation is provided for the lord for his interest in these lands, and that there are other lands to which this section may apply, namely, those which are to be allotted for public purposes and to provide fuel for the cottagers, as to which nothing is done to disturb the right of the lord to the minerals.

I can not, however, see anything to limit this 58th section, and I think so the more, from the peculiar use of the word

"soil." *Prima facie*, it would include every thing above or below it; but the word "soil" is throughout this act used as distinct from the word "land."

The 6th section authorizes the commissioners to determine any dispute of any parties "interested in the said lands," but not their title, and the 7th declares the determination of the commissioners, touching the right of the soil, to be final. My impression is that in this act of Parliament the use of the word "soil" is distinct from "land."

This act directs that the allotment to be made to the lord is to be "in lieu of and in full compensation for" his "right and interest in and to the soil."

Now, referring to the dictionaries, I find that Johnson's second definition of the word "soil" is "earth considered with relation to its vegetative qualities." And in Richardson, the definition of the word is this, "The earth, land, ground; land with reference to its produce."

There is a clear distinction between "soil" and "land." Webster's third definition of soil is, "3. The upper stratum of earth; the mould, or that compound substance which furnishes nutriment to plants, or which is particularly adapted to support and nourish them."

I think the word "soil" throughout the act is used as equivalent to "surface," though if the question rested on the 27th and 28th sections alone, without the 58th or saving clause, I should have held that the word "soil" included the minerals, and that these sections deprived the lord of his right to them. But I see nothing in these clauses, or in the act, to limit the operation of the 58th section, and I can not, without introducing additional words into that section, limit its operation to the mines under one species of allotment more than another; they are all given alike, and the 27th clause, giving the lord compensation for his right to the soil of all the lands awarded, is consistent with this view, and with the distinction between the words "land" and "soil" as used in the act.

The chief clerk's certificate must, therefore, be confirmed.

On further consideration the bill was dismissed with costs.

MANNING ET AL. V. FRAZIER.

(96 Illinois, 279. Supreme Court, 1880.)

¹ Real estate, what constitutes. Coal and other mineral in a mine and under the soil are real estate, and as such are capable of being conveyed like any other real estate, and when once conveyed by deed, may pass by inheritance or deed of conveyance.

Vendor's lien for price of mineral in ground sold. Where the owner of land, by deed, bargains, sells and conveys to another, his heirs and assigns, all the coal, limestone, iron ore, rock oil and other mineral in, upon or under the land, with an express license to the grantee, his heirs and assigns and laborers, to enter and search for said minerals and to dig, mine, explore and occupy with the necessary structures, etc., and to mine and remove the coal, etc., for which grant the purchaser agrees to pay to the grantor a stipulated price per ton for the various minerals removed, payable quarterly, the grantor will have a vendor's lien on the coal and mineral not mined and removed, for the purchase money, which he may enforce by a sale of the coal and mineral not taken from the ground. In such case the amount of the purchase money falling due each quarter depends upon the quantity of coal, etc., mined and removed from the land during the three months next preceding. The price agreed to be paid per ton is only a mode of ascertaining the amount of purchase money to be paid for the conveyance of the coal, etc., in the mine.

Same—Waiver of lien—Its extent. If a deed conveying coal and other mineral in the ground on a credit, to be paid for quarterly as the same are mined and removed, authorizes the sale of the coal, etc., before payment is to be made, that will only be a waiver of the vendor's lien *pro tanto* for what is thus removed, but not for the coal, etc., still in the mine.

License—Not transferable. A mere license in writing to mine, remove and sell coal, etc., the product of such mining to be paid for at a given price per ton, is not transferable either by assignment or deed so as to pass any legal right or title.

Covenant in deed—Of its character. A covenant in a conveyance of mineral in the ground, by the grantee to the grantor, to pay the latter a certain sum per ton for the mineral removed, is not a collateral covenant, but is a covenant to pay the purchase money for the sale of all the mineral in the manner specified.

¹The syllabi in this case are copied literally from the official report and the arguments of counsel the same. It will be noticed that three out of the six or seven judges dissented, and the case would have been discarded on that account, but for the *importance* of the subject and the *novelty* of the view taken of the subject.

Writ of error to the Appellate Court for the Third District, the Hon. C. L. HIGBEE, Presiding Justice, and the Hon. OLIVER L. DAVIS and Hon. LYMAN LACEY, Justices; heard in that court on error to the Circuit Court of Vermilion County, the Hon. OLIVER L. DAVIS, Judge, presiding.

Mr. JAMES E. MONROE, for the plaintiffs in error.

A vendor's lien being secret is not favored: *Richards v. Leaming*, 27 Ill. 432; *Conover v. Warren*, 1 Gilm. 502; *Boynton v. Champlin*, 42 Ill. 64; *Doolittle v. Jenkins*, 55 Id. 402.

The right of resale before the time of payment is a waiver of the vendor's lien, even if it would otherwise have existed: *Ex parte Parks*, 1 Glyn. & Jam. R. 228; *Brown v. Gilman*, 4 Wheat. 290.

If a sale is made on the personal responsibility of the vendee, no such lien will exist: 1 Lead. Cases in Eq., part 1, p. 487; *Albert Co. v. Western Soc.*, Law Rep. 11 Eq. Cases, 178; *Earl of Jersey v. Briton Dock Co.*, Law Rep. 7 Eq. Cases, 412.

A vendor's lien exists only on the sale of land for the purchase money agreed to be paid as such. If the land is, by the terms of the contract, to be converted into personal estate and removed and paid for as such, after being so converted and removed, the sale is, in all essential respects, a sale of chattels, and no lien can be implied.

A contract for the sale of standing wood, to be cut and carried away by the vendee, is to be construed as passing only an interest in the trees when they are severed from the freehold. They then pass as personal property: *Douglas v. Shumway*, 13 Gray, 502; *Claflin v. Carpenter*, 4 Metc. 580; *Smith v. Surman*, 9 Barn. & Cress. 561; *Marshall v. Green*, 1 Law Rep. C. P. Div. 35.

It is not material whether the severance is to be made by the vendor or vendee: *Whitmarsh v. Walker*, 1 Metc. 315.

There is no lien in favor of the vendor of chattels after possession has been delivered to the vendee, or when, as here, the sale is made on credit: Benjamin on Sales, Sec. 797; *Parks v. Hall*, 2 Pick. 206; *Cade v. Brownlee*, 15 Ind. 369.

When the consideration for the conveyance of land is the covenant of the grantee, and such covenant is substituted for the purchase money, or taken as a mode of payment of the price of the land, the vendor's lien will not be implied—it will be waived.

If the covenants of the vendee are substituted for the purchase money and taken as a mode of payment for the land, the money due for a breach of these covenants is not purchase money, but simply damages, and there is no vendor's lien: *McKillip v. McKillip*, 8 Barb. 552; *McCondlesh v. Keen*, 13 Gratt. 615; *Patterson v. Edwards*, 29 Miss. 271.

I refer to the following cases as announcing the same rule: *Brawley v. Catron*, 8 Leigh, 522; *Parrott v. Sweetland*, 3 Myl. & Keen, 655; *Winter v. Lord Anson*, 1 Sim. & Stu. 435; *Clark v. Royle*, 3 Sims. Ch. 500.

The vendor's lien will not arise if the amount of the consideration is uncertain and unliquidated: 1 Perry on Trusts, Sec. 235.

The bill does not aver a case of complicated accounts, nor a case involving any fiduciary relation, nor does it seek any discovery. The items are all on one side. The jurisdiction on the ground of account utterly fails: *Porter v. Spencer*, 2 Johns. Ch. 169; *Pearl v. Nashville*, 10 Yerger, 179; *Dinwiddie v. Bailey*, 6 Vesey, 136.

But if there was a case for an accounting, the court erred in not referring the case to a master to take an account: *Moss v. McCall*, 75 Ill. 190; *Quayle v. Guild*, 83 Id. 553.

MR. D. D. EVANS and MR. C. M. SWALLOW, for the defendant in error.

The main question now before the court is whether, under the facts and circumstances as they appear in the bill, a vendor's lien exists in favor of the defendant in error, and can be enforced.

That by the agreement copied in the record there is an absolute sale and conveyance by Frazier of real estate to Squire and Payne, is fully settled by the following decisions and the authorities therein referred to: *Caldwell v. Fulton*, 31 Pa. St. 475; *Massot v. Moses*, 3 S. C. 168, reported in 16 American Reports, 697.

While it is true that such liens are not favored by the courts, yet, when they are shown to exist, they must be enforced. They are maintained to protect the vendors of real estate and are the creatures of the vigilance of courts of equity: *Wilson v. Lyon*, 51 Ill. 169; *Dyer v. Martin et al.*, 4 Scam. 151.

Illinois has favored and enforced the remedy to a greater extent than most of the other States: *Grove v. Miles*, 71 Ill. 376; *Grove v. Miles*, 58 Id. 339.

The consideration money remains a lien on the property until paid for, and no one could reasonably suppose that he could buy the property clear of the duty of payment. It is charged upon the land and stands in the title. So the Supreme Court of Pennsylvania has decided in a somewhat similar case: *Neas' Appeal*, 31 Pa. St. 293, and see authorities therein referred to.

If a vendor's lien exists in favor of Frazier, subsequent purchasers took with notice of such lien, and it can, therefore, be enforced against them.

The agreement was spread at large upon the records of the county where the real estate conveyed is situate. This was notice to all, of its terms, conditions and provisions. They stood in the chain of title, and purchasers took with notice of them: *Chicago, Rock Island and Pacific Railroad Co. v. Kennedy*, 70 Ill. 361; *Cordova v. Hood*, 17 Wall (U. S.) 1.

The subsequent purchasers, who are parties to the bill, are chargeable with notice of the non-payment of the purchase money.

That which is sufficient to put purchasers upon inquiry is good notice: *Russell v. Ranson*, 76 Ill. 171; *Babcock v. Lisk*, 57 Id. 329; *Parker v. Foy*, 5 Am. Rep. 486; *Hamilton v. Nutt*, 34 Conn. 509.

Mr. Justice WALKER delivered the opinion of the court.

Defendant in error entered into a written contract, on the 25th day of February, 1865, with John R. Squire and O. D. Payne, by which he, in consideration of one dollar and the agreements contained in the contract, bargained, sold and con-

veyed to them, their heirs and assigns, all of the coal, limestone, iron ore, rock oil, and other minerals in, upon or under a certain farm or tract of land, which was particularly described, and containing 700 acres. The deed granted to them, their heirs or assigns, as well as their laborers and workmen, the right to enter upon and search for such minerals, and to dig, mine, explore and occupy with necessary structures and buildings, and to mine and remove the coal, limestone, etc. And the parties of the second part were bound to enter upon and make search for coal, etc., within two years from that date. They, by the agreement, had the right to abandon the land and mining operations and remove all structures, etc., when the coal should be exhausted.

The parties of the second part were bound to have preparations made for taking out coal for market within two years. They bound themselves and their assigns to pay to the party of the first part, twelve cents for each ton of coal and limestone mined and removed from the land, and for ore ten cents per ton, payments to be made quarterly. The agreement was recorded in the proper office.

Afterward, the parties of the second part assigned the agreement to defendants, Sawyer, Manning and Clement. It is alleged that they entered under the agreement, and had mined and removed 25,000 tons of coal from the land, but had not paid the stipulated price therefor, or any part thereof, quarterly or otherwise; that three thousand dollars are due to complainant, under the agreement, and that sum is a part of the purchase money for the coal thus sold and has become and is a lien on the coal and other minerals not yet mined or removed from the land that complainant has never received any security for the purchase money, and has not waived or discharged it.

The bill alleges that Payne did not part with all of his interest in the contract, and that other parties, naming them, claimed some interest in the contract.

The bill makes all persons charged with claiming an interest in the agreement, parties, and prays that an account be taken and the sum found due paid, and in default thereof the coal and other minerals still in the land be sold, and the money arising from the sale be applied in payment of the amount that should be found due to complainant.

Clement answered, denying that Sawyer and Manning were the assignees of Squire and Payne, but that they did assign to one McGillen, who afterward assigned to Sawyer, Manning and Clement; that he has never been concerned at any time in mining coal on the land, and denies that his one third interest is liable for the payment of the money claimed to be due.

Sawyer, Payne and Crosby filed a demurrer to the bill. This demurrer was overruled by the court, and the demurrants failed to answer. The bill was dismissed as to Clement, and the relief prayed was granted as to the other defendants. They appealed to the Appellate Court for the Third District, in which the decree was affirmed, and the record is brought to this court on error.

The question is presented, whether these facts, admitted by the demurrer, afford grounds for the relief sought. Does complainant hold a vendor's or implied lien on the coal or minerals in the mine, and not yet removed, for the unpaid purchase money?

That the coal and other minerals in the mine, under the soil, was real estate, is too plain to admit of discussion. And it is equally true and manifest that, as such, it was capable of being conveyed like other real estate; and the coal, stone and ore thus situated was conveyed by complainant to Squire and Payne, and they thereby received an estate capable of being inherited and conveyed to others; and the bill alleges, and the demurrer admits, the estate was conveyed by Squire and Payne to plaintiffs in error. It, then, appears that complainant was a vendor, and, being a vendor, does he hold a lien that may be enforced against the remaining coal, stone and ore thus conveyed and not removed from the mine?

It is insisted that the money claimed to be due is not purchase money, but is due, if at all, for and as the price of the coal after it ceased to be real estate and had become personal property; that no money became due until the coal became personalty, and the agreement was to afterward pay for the coal as personalty and not as real estate. It is undeniably true that the time for payment did not elapse until after the coal had been changed from real to personal property. And if, according to the terms of the agreement, the

title to the coal did not vest in plaintiffs in error until the coal was mined and removed, then complainant sold and they purchased coal as personalty and not as realty, and whatever is due is purchase money for chattels and not for real estate. No rule of equity would justify the decree as a lien on the land, or the coal as land, for the purchase money of chattels, unless such a lien should be reserved by express agreement.

But is this the purchase money of the chattels, or of the real estate sold and conveyed by complainant? There can be no pretense that he ever received the price for which he sold the minerals as land.

If the price agreed to be paid for each ton of coal removed was, however, but a mode of ascertaining the amount of purchase money to be paid for the conveyance of the coal and other minerals in the mine, then the money as it became due was purchase money for the coal conveyed, as realty. The fair and reasonable construction of the instrument, we think, is that it was a sale and conveyance of the coal in the mine on credit, and to be paid at stated periods after the coal was removed, and that the amount of each of these quarterly payments was left indefinite, and the amount to be ascertained by computation from the number of tons removed during the previous three months, at the sum named for each ton. The time for payments to be made was not definitely fixed, and the amount of each payment was left contingent, depending upon the amount of coal removed during each period. But the money thus to be paid was purchase money for the conveyance of the coal, stone and ore. The title to the coal undoubtedly vested in the grantee in the deed, and there is no pretense that it has ever been paid for, or that any other mode of payment was ever agreed upon by the parties. If the purchase money for the coal sold and conveyed was not to be paid in this manner, in what mode was it to be paid?

But it is said that complainant waived the lien because the deed contemplates the sale of the coal before payments are to be made. The deed does not give the privilege, in terms at least, to sell any portion of the coal before payment, but if it does by implication, it would only be a waiver *pro tanto* for the coal thus removed, and not as to that still in the mine. And the bill does not seek to enforce a lien against

the coal already removed. If it were, then there would be force in the position. Were one person to sell to another, land covered with timber, and invest him with title by a conveyance, and the grantor would thereby empower him to remove and sell the timber, or suppose he were to consent in writing for the vendee to do so, and he were to remove and sell all of the timber, would any one contend that the vendor had thereby waived his vendor's lien? Surely not. All can see he would thereby waive his lien on the timber in the hands of a purchaser, but not on the land itself. So of the removal of stone, gravel, sand or earth.

It is said the decree gives a lien on the coal not yet mined and removed for the purchase money thereon, which is not due. This is manifestly a misconception of the question. When the conveyance was made, the lien attached to all of the coal, etc., in the mine. It attached as a whole and not in fragments. The price for each ton did not become a lien on each several ton, but the whole purchase money became a lien on all of the coal, etc., in the entire mine, and the sum which became due on the removal of coal remained as it was previously, a lien on the balance which remained to be mined. Hence the decree is for the purchase money which had become due, and for the sale of the unmined coal for its payment, thus enforcing the lien.

It is urged that this is but a license to mine, remove and sell coal, etc., and to pay therefor the prices fixed on the various minerals. If this be true, plaintiff in error acquired no legal rights by the assignment of the deed, whether by conveyance or otherwise. If this was but a license to Squire and Payne, then it is not the subject of a conveyance of any legal right or title, yet plaintiff in error claims the right to mine, remove and sell the coal mentioned in the grant.

Again, it is claimed the agreement to pay for the coal is but a collateral covenant; and in support of the proposition, cases are referred to where conveyances were made, and the vendee covenanted to pay the grantor an annuity for life, or to support him for life, or to pay money to others, which were held to be collateral covenants, and a vendor's lien did not attach. The cases are, no doubt, correctly determined, but they are entirely unlike this. Here the covenant is to

pay the purchase money directly to the vendor, in the manner specified. We fail to see that this covenant to pay is collateral, or relates to any thing collateral, to this conveyance. The sum named for each ton of coal, stone or ore removed, was but a mode of ascertaining the amount of consideration to be paid at each installment, and not as a sale of each of the various minerals when removed; and, if this be true, and of which we entertain no doubt, when the conveyance was made, the unpaid purchase money became a lien on all of each kind of mineral, and when the money became due by removing one kind, it did not release or remove the lien on another kind. The minerals were sold, the purchase money was not paid, and, as complainant did nothing manifesting an intention to waive his vendor's lien, equity will hold that it attached and must be enforced for the amount of purchase money due and unpaid.

This case is wholly unlike those where the grant is of personal property savoring of the realty, which was to be removed and sold as chattels, and the vendor endeavored to enforce an implied or vendor's lien against the chattels. Such a lien does not attach to chattels. After this coal, stone or ore is mined, complainant has no lien on the chattels, but as long as it remains undisturbed in the mine it is realty, and is subject to the lien.

After careful consideration of the whole case, we are unable to perceive any error, and the decree is affirmed.

Decree affirmed.

SCOTT, SHELDON and SCHOLFIELD, JJ.: We do not concur in this opinion.

1. Warranty runs with the mine as in other cases of land: *Blackwell v. Atkinson*, 14 Cal. 470; *Post* WARRANTY.

2. The law of descent applied to mines as realty: *Carhart v. Montana Co.*, 1 Mont. 245.

3. Mining claims are real estate: *Houtz v. Gisborn*, 2 M. R. 340; *Merritt v. Judd*, 6 M. R. 62.

ASTRY V. BALLARD.

(2 Modern Rep. 193; King's Bench, 28 and 29, Charles II.)

Men's grants must be taken according to common intendment, not straining the language to the destruction of the inheritance.

¹ **Mine unopened is no mine.** A mine is not properly so called till it is opened; it is but a vein before.

Open and unopened mines. Under lease of lands not mentioning mines the lessee may work the open but not the unopened mines.

In an action of trover and conversion for the taking of coals, upon not guilty pleaded, the jury found a special verdict. The case was thus, viz.:

That one J. R. was seized in fee of the manor of Westerly, and being so seized did demise all the messuages, lands, tenements and hereditaments that he had in the said manor, for a term of years, to N. R., in which demise there was a recital of a grant of the said manor, messuages, lands, tenements, commons and mines, but in the lease itself to R. the word mines was left out. Afterward the reversion was sold to the plaintiff, Astry, and his heirs, by deed enrolled, and at the time of this demise there were certain mines of coals open, and others which were not then open, and the coals for which this action of trover was brought were digged by the lessee in those mines which were not open at the time of the lease, and whether he had power so to do was the question.

It was said that when a man is seized of lands wherein there are mines open and others not open, and a lease is made of these lands, in which the mines are mentioned, it is no new doctrine to say that the close mines shall not pass. Men's grants must be taken according to usual and common intendment, and when words may be satisfied, they shall not be strained further than they are generally used, for no violent construction shall be made to prejudice a man's inheritance contrary to the plain meaning of the words.

A mine is not properly so called until it is opened; it is but

¹ *Shaw v. Wallace*, 25 N. J. Law, 453; *Post* *THRESPASS*; *Crouch v. Puryear*, 1 Rand. 258; *Post* *WASTE*.

a vein of coals before, and this was the opinion of Lord Coke in point in his First Inst., 54 b, where he tells us that if a man demise lands and mines, some being opened and others not, the lessee may use the mines opened, but hath no power to dig the unopened mines; and of this opinion was the whole court; and Justice Twisden said that he knew no reason why Lord Coke's single opinion should not be as good an authority as Fitzherbert in his Nat. Br. on the Doctor and Student.

¹SMITH ET AL. V. MORRIS.

(2 Brown's C. C., 311; 2 Dickens, 697. High Court of Chancery, 1788.)

²**Lessee of exhausted colliery relieved in equity.** Plaintiff, lessee of a colliery at a rate of so much per wey, the colliery becoming not worth working, and plaintiff offering to pay for all the coal that could be got: *Relieved*, upon terms, against the future rent and the covenant in the lease to work the colliery.

Bill by the plaintiffs, representatives of Chauncy Townshend, Esq., deceased, lessee of a colliery from defendant.

By lease of the 24th of May, 1769, the defendant demised to the said Chauncy Townshend a piece of land in the parish of Langevilack, in Glamorganshire, part of a tenement called Pwlyr Air, and all the veins, etc., of coal or culm which then were or should be opened in or under the said tenement, from the 26th of March then last past, for forty-five years, at the yearly rent of 9*s.* per annum for the piece of land, and 30*s.* per acre for the rest of the tenement, which should be used on the surface thereof for the purposes of the colliery, and paying, in respect of the coal works, to defendant, etc., 9*s.* 6*d.* for

¹ S. C. at law, 6 M. R. 22.

² As to where equity will or will not relieve in like cases, see *Wadman v. Calcraft*, 10 Ves. 67; 12 Ves. 334; *Davis v. West*, 12 Ves. 475; *Sanders v. Pope*, 12 Ves. 232; *Sparks v. Liverpool Waterworks Co.*, 13 Ves. 428; *Hill v. Barclay*, 18 Ves. 56, 60; *Reynolds v. Pitt*, 19 Ves. 134; *Mellers v. Duke of Devonshire*, 16 Beav. 255; *Ridgway v. Sneyd*, 8 M. R. 414; *Talbot v. Ford*, 13 Sim. 173.

every way of coals or culm which should be wrought, raised or landed (except as therein excepted), the said rent to be subject to such deductions as after mentioned, viz.: that if the lessee should in any year use or sell more coal or culm, for which he was to pay in money, than 1,000 weys, he was to pay only 9s. per wey for the overplus, provided the defendants had received 9s. 6d. per wey upon 1,000 weys for every year the lessee should have worked. And the lessee covenanted in the lease that he would diligently, at his own costs, try for veins of coal, and use his utmost skill to come at the same, and get into working thereof, within three years, by such pits, engines, etc., as were usual, and would, within one month after he should have sunk such a pit, constantly (unless hindered by unavoidable accidents) work and raise 900 weys of coal yearly, if so much good, merchantable coal might be had out of the same; and in case so much coal can not be had (without working the pillars necessary for supporting the work) would pay to the defendant, etc., 9s. 6d. for every wey of coals which he, etc., should neglect to raise, and which should be deficient of such quantity of 900 weys; the money for the deficiency to be paid at the end of every year; and if he should neglect to sink a pit within three years, he should pay the defendant 9s. 6d. per wey yearly, for 900 weys, until he should have sunk such pit. And there was a proviso in the deed that in *case, with using due diligence, there should not be found a sufficient quantity of coal to work 900 weys a year, or if the lessee during the term should have worked all the coal, except the necessary pillars for the supporting the work, from thenceforth the lessee should be discharged from the covenant for working 900 weys of coals a year, and from all payments by reason of not working the same.*

And there was also a covenant that the lessee should be at liberty to work and burn coal in the fire engine.

And there was also a covenant by which the lessor was to be supplied with coal for his family at the expense of getting the same.

Chauncy Townshend, the lessee, died in 1770, and by his will and subsequent transactions the lease became the property of the plaintiffs, who made trials for coals on the land, but could not sink a pit within the three years, but in

1772 began to sink a pit which was completed in 1778, and in that year raised 1,147 weys of coals, in the next year 1,000 weys, for which the defendant was paid at the rate of 9s. 6d. per wey.

The plaintiffs continued working the colliery till 1780, when very great breaks and faults happening in the veins, *rendered the working more expensive than was conceived* at the time of taking the lease, insomuch as greatly to exceed the value at which the coals could be sold, by which they sustained a loss of 40s. per day, on which account they stopped working the colliery; and conceiving that, under the covenant in the lease, they were discharged from payment of the rent, ceased to pay the same. The defendant, in Trinity term, 1782, brought an action, and assigned seven breaches besides that for not working the mine, which were all given up at the trial, but upon that for not working, although the plaintiffs proved the unavoidable accidents above stated, the jury gave a verdict for the defendant, and assessed the damages at £427 10s. which were paid; he afterwards, in Hilary term, 1784, brought another action, and recovered a verdict on the same breach, with £584 7s. 6d. damages, and in Trinity term, 1785, brought two other actions, and threatened to bring similar actions every year.

The plaintiffs therefore filed the present bill, charging that under the circumstances they were not compellable to work the mine, and that even if they had worked it, the mine would, before the filing of the bill, have been exhausted, except working the pillars; therefore, that it is contrary to justice that the defendant should avail himself of the accidents which had happened, but that upon the defendant's being paid for so many coals as could be got, he ought not to require any further payment under the lease. The bill therefore prayed an account of the quantity of coals capable of being raised, allowing necessary pillars to support the works, and for a fire engine; and in case it should appear that the defendant had received a sum equal to the rent, payable by virtue of the lease for the same, that he should be restrained by injunction from bringing or prosecuting actions for the rent, or if it should appear that he had not been fully paid, then, upon payment of so much as he should be unpaid, he should be restrained in like manner.

Mr. MANSFIELD and Mr. MITFORD, for the plaintiff.—The prayer of the bill is, that upon payment for all the coals that could be got, the defendant shall be restrained from bringing actions. The spirit of the contract entered into between the parties was that Morris should be paid at the rate of 9s. 6d. per wey for all the merchantable coals there could, by due diligence, be raised out of his ground. If he is paid for all, he has the whole benefit of the contract. The coal was not to be paid for till raised; therefore there are stipulations in the contract to compel, 1st, the trying for coal; 2dly, the working it as long as there should remain any coal in the mine. Those stipulations are in the nature of penalties, and may be relieved against if the defendant has a compensation for them. If he is paid for the coals the spirit of the contract is performed. In such cases the court has relieved, as for instance, by payment of interest for a sum delayed to be paid: *Aylet v. Dodd*, 2 Atk. 238. As the verdict is entered we are prevented from arguing that no more coal can be got, but it will be so expensive to get it that it is better for us to pay the value, without getting the coal; to compel us, in that case, to work the mine or pay the rent during the term, would be to take advantage of the misfortune. If the mine had been worked out the rent was to cease.

The intention of the parties never could be that the defendant was to get more by the mine being a bad one, than by its being a good one.

Mr. SCOTT and Mr. RICHARDS, for the defendant.—The contract was that Morris should have so much money as the quantity of coal should produce, at so much per wey. This appears from the covenant that if the lessee did not work the mine for any year, but paid rent for it, and in a subsequent year worked it to a greater amount than 900 weys, he might retain the rent for coal which he had not got in the former year. But suppose, he had not worked it for two years, but paid the rent, and then in one year had worked the mine out, and it had not produced 1,800 weys, could he have called on the lessor to refund what he had paid above the price of the coals obtained? Yet that would be the consequence if the spirit of the contract was as contended for on,

the other side. But contracts for mines differ from other contracts; a great deal of speculation enters into the constitution of them; they are frequently for the purpose of working other mines and leaving those contracted for dormant, at a dead rent. The lessee here appears, by the covenant, to be treating with respect to his concerns in other mines. The parties have decided the only means to ascertain the quantity to be by working the mine; a court of equity has nothing to do with it, and can not substitute a less accurate method of ascertaining the quantity; it would not be doing justice between man and man. If it was otherwise the situation of a lessor would be a situation of great hazard, that of the lessee not so, as he would have the chance of all his speculations.

The first covenant in the *reddendum* is to sink the pit, and if he does not, to pay a dead rent at the rate of 900 weys. But the covenant that in case, with due diligence, there should not be found coal sufficient to work 900 weys, or the coal should all have been worked, the rent was to cease, is decisive. Was it to cease without due diligence being used, and to be relieved by a new speculation in a court of equity? Another covenant is, that he shall deliver good coal for Morris' use for firing. If Mr. Morris is only to be paid for the coal, how is the firing to be supplied? It will be contended that a compensation can be made for it; but it shows the intent of the parties, that the value of the coal was not intended to be the only benefit to be derived by the defendant from the lease, and that the coal was really to be gotten, which it would have been but for negligence on the part of the plaintiffs. In fact, Morris offered, before this fault happened, to accept the surrender of the lease, to which the plaintiff would not then agree, so that he has very little equity now to compel the acceptance of it.

MASTER OF THE ROLLS, KENYON.

I can not bring my mind to balance upon this subject. A court of equity must forget its name, if it did not interfere in a case so circumstanced. The contract was, as Mr. Mitford stated it, a contract for all the coals contained in the land at 9s. 6d. per wey. Mr. Scott said that if a court of equity in-

terfered it would not be doing justice between man and man. If it would not be so, I must much mistake the nature of the object. If any possible disadvantage could arise to Mr. Morris I would not interfere. It is true, if parties enter into legal contracts they are bound to fulfill them. But if parties enter into contracts which are enforced for purposes of harassment and vexation, courts of equity properly interfere. Smith calls upon the court to interfere, because if he carries the contract into execution he must pursue the object at a greater expense than he can gain by it, the property being either not attainable or attainable only at an intolerable expense. Admitting it to be attainable in this way, the offer to pay Morris all he could ever obtain without incurring the expense, is offering him everything he can fairly require. What disadvantage will it be to him? He will be paid for the coals, although they will be left upon the estate. It is clear Mr. Smith can not be compelled to go on with a disadvantageous business, from which Morris is to derive no advantage.

It must be referred to the master to inquire what quantity of coals remain to be got upon the estate on the terms in the lease,¹ and the plaintiff undertaking to pay for the same as aforesaid and to surrender the lease, the defendant must be restrained from proceeding in his actions.

¹The decree, however, proceeded thus: "And that is the value of the same at the rate of 9s. 6d. a wey; and the plaintiffs undertaking to pay what shall be such value, and likewise to surrender up the lease *in case the defendant will accept the same*—

"It is ordered and decreed that they do pay annually, the sum of £427' 10s., agreed to be paid by the said lease, as the same shall become due, into the bank with, etc., without prejudice, subject to the further order of this court. And in case the defendant shall accept a surrender of the lease, it is further ordered that the master do inquire and state what will be a full satisfaction to the defendant of the covenants in the said lease."

Reserving costs and further directions.

CLIFTON V. WALMESLEY ET AL.

(5 Term R. 564. King's Bench, 1794.)

Royalty on coal sold at pit's mouth—Plain covenant not left to parol testimony. A lessee of coal mines to pay a rent certain and a certain share of such sums of money as all or any of the coal should sell for at the pit's mouth, is not liable under such covenant to pay to the lessor any part of the money produced by sale of the coal elsewhere than at the pit's mouth; and evidence of the lessees having accounted with the lessor and paid him the share of money produced by the sale of coal elsewhere, is not admissible to explain the intention of the parties.

This was an action of covenant, wherein the declaration stated an indenture, dated 30th September, 1871, whereby Thomas Clifton, under whom the plaintiff claimed, demised to the defendants certain quarries of cannel for 21 years at the yearly rent of £150, and the further sum of 1s. and 9d. for every score baskets of cannel, computing 24 baskets to the score, over and above 41, and for a certain proportion of cannel therein described, to be annually paid in kind, "and also one half part or share of all such sum and sums of money as all or any of the cannel to be gotten by virtue of the said indenture should sell for at the pit mouth over and above 4d. the basket, or top and bottom," and for certain other considerations therein mentioned. There were other covenants for the payment of the rent and the management of the demised premises, and also that the lessees would from time to time deliver to the lessor, etc., "a true and particular account of all the cannel which should be raised or gotten by virtue of the liberties and privileges thereby granted, and of the price and prices at which the same and every part thereof should be sold at the pit or pits out of which the same should be gotten and raised." And further, that it might be lawful for the lessor, etc., "to inspect books of account which should from time to time be kept by the auditor, etc., to the said cannel works, to see and take an account thereout of the quantities of cannel from time to time got at the said cannel works, or any of them, and of the price and prices at which the same and every part thereof should be sold at the pit." Several breaches

of covenant were assigned; amongst others the following one: That before the 25th March, 1793 (to wit), on the 1st January, 1792, and on divers other days and times between that day and the 25th day of March, 1793, divers baskets of the cannel, got by virtue of the said indenture, were and had been sold for at the pit mouth more than 4*d.* the basket, or top and bottom (to wit), 8*d.* for the basket over and above 4*d.* the basket, or top and bottom; whereby the defendants were liable to pay to the plaintiff one half of the said sums of money over and above 4*d.* the basket, or top and bottom, amounting in the whole to £1,333 6*s.* 8*d.*, which they have not yet paid. The defendants pleaded they did not break the covenants on which issue was joined. Upon the trial of the cause it was admitted that Messrs. Blundells (assignees of the defendants) had, within the period mentioned in the third breach, sold several quantities of top and bottom cannel at the pit mouth for more than 4*d.* the basket, one moiety of the surplus whereof has been paid into court. Messrs. Blundells, within the period mentioned in the third breach, also raised divers quantities of cannel at the pit's mouth upon the premises; which cannel they led away from the premises and sold elsewhere, at different prices, beyond 4*d.* per basket, when the selling prices of the pit's mouth at the same time were above 4*d.* the basket; for the half of which surplus prices, called the half price, the action as to the third breach is brought. The plaintiff offered evidence to show that from the date of the lease till March, 1791, at which time the plaintiff had notice of an assignment of the lease to Messrs. Blundells, whom he refused to accept as tenants, the defendants, when the coal produced 4*d.* per basket at the pit's mouth, and they led away the coal and sold it elsewhere, paid to the plaintiff a moiety of the selling price of the coals above 4*d.* per basket at the pit's mouth; which evidence was rejected by the learned judge. A verdict was agreed to be found for the plaintiff for the nominal sum of £200 as damages, and 40*s.* costs, subject to be reduced or increased by the award of James Wareing, if this court should be of opinion that upon the points reserved the plaintiff is entitled to a verdict; if not, and the court should be of opinion that the evidence above mentioned was rightly rejected, a judgment of nonsuit to be entered; and the points submitted to the court were: 1st,

whether upon the true construction of the above lease, unexplained by extrinsic evidence, the half of such sums of money as the cannel got by virtue of the indenture, and sold elsewhere than at the pit's mouth, would have produced, if sold at the pit's mouth, is due to the plaintiff, when the selling price of the top and bottom coal at the pit's mouth at the same time was above 4*l.* per basket, and if the court should be of opinion with the defendants upon this point, then 2*l.*, whether the evidence above mentioned to have been rejected ought to have been received.

Wood, for the plaintiff, contended as though the breach assigned did not fall within the literal wording of the covenant, yet it was substantially warranted by it. At the time when the covenant was drawn, all the coal was sold at the pit's mouth, since which time, by means of a canal, an opportunity is afforded of carrying it to a more distant market; but the contract between the parties must still be understood to stand upon the same equitable footing it was before; for effecting which the court will not tie them down to the mere words, but look to the meaning of the contracting parties. There can be no doubt but that the intent of the covenant was that the lessor should share the half of whatever price the coal produced at the market; and whether it was further from the pit, or nearer to it, could not possibly vary the case. For this purpose it is perfectly safe to consider the sale as made at the pit's mouth, as far as regards the regulation of the price. And if the evidence offered had been received, it would have been decisive to show that the defendants themselves so understood the contract. In *Cooke v. Booth*, Cowp. 819, where the question was whether a covenant by the lessor to renew under the same rents and covenants should be considered as a covenant for a perpetual renewal, evidence of acts of the ancestors of the lessor, who had frequently renewed, was admitted to show the intention of the contracting parties.

LAMBE, *contra*, was stopped by the court.

Lord KENTON, C. J.

The conduct of the defendants may possibly be a fraud upon the covenant, and perhaps a court of equity would give

the plaintiff some relief; but how can this court get rid of the covenant in the shape in which the question is brought before us? Suppose the breach had been assigned that this coal had been sold for so much at Liverpool, it could not have been supported upon a demurrer. Then the covenant not being ambiguous in the term of it, can not be explained by parol evidence. This case is distinguishable from that of *Cooke v. Booth* which was determined on the same principle as that of *Furnival v. Crew*, 3 Atk. 83, and others. Here the covenant is drawn in clear and explicit terms.

GROSE, J.

The court can not declare that the coal was sold at the pit's mouth, which is expressly stated to be sold elsewhere. Whatever the meaning of the parties might have been, we can only look for it in the covenant; and in that they have expressed themselves precisely and unambiguously; and therefore we can not receive extraneous evidence in explanation of it.

Postea to the defendant.

THE COPPER MINING COMPANY V. BEACH.

(13 Beavan. 478. Before the Vice Chancellor, 1823.)

¹ **Covenant construed to imply perpetual renewal.** A granted a lease and covenanted that he would always, at any time when requested by the lessees, etc., demise the premises for the further term of thirty-one years, in which new lease were to be contained *the same* covenants, articles, clauses, provisos and agreements: *Held*, that this amounted to a covenant for a perpetual renewal.

Form of recital in renewal lease. A testator covenanted for a perpetual renewal of a lease: *Held*, that the proper form of lease to be granted in renewal, was a demise for the new term, reciting the original covenant.

In 1757 a lease was granted of some mining property, for thirty-one years, with a covenant for renewal in the form after stated, and renewed leases were, in 1774 and 1788 granted, containing similar covenants for renewal. The last-mentioned lease

¹ *Page v. Esty*, 54 Me. 319; compare *Hyde v. Skinner*, 2 P. Wms. 196.

was made between Mr. Talbot, of the one part, and the Copper Mining Company of the other part, and thereby the property was leased for thirty-one years. This lease contained the following covenant for renewal: "That he, the said Thomas M. Talbot, his heirs and assigns, in consideration of the sum of £400, paid by the said Governor and Company, would, at the costs of the said Governor and Company, always, at any time, when and as often as the said Governor and Company, their successors or assigns, should and would request the same, by indenture under his or their hands and seal, lease, demise, set, and to farm, let, unto the said Governor and Company, and their successors or assigns respectively, all and singular the premises thereinbefore demised, together with all the liberties, privileges, powers and authorities, in as full, large and ample manner as the same were thereinbefore granted, to commence at the feast of the Annunciation of our Blessed Virgin Mary, or St. Michael, the Archangel, whichever should happen to be next preceding the execution of such new lease, for the further term of thirty-one years, from thence next ensuing, and fully to be complete and ended, in which said new lease or leases were to be contained and inserted the same rents, payments, reservations, covenants, articles, clauses, provisos and agreements, as were thereinbefore mentioned and contained."

Mr. Talbot, by his will, dated in 1810, devised his real estates, and amongst them the mines in question, unto the defendants, M. H. Beach and W. H. Beach and John Hunt, since deceased, and their heirs, upon certain trusts.

In 1819, after the death of Mr. Talbot, the draft of a renewed lease from the trustees of his will to the copper mining company was prepared, and in this draft Mr. Polson, the conveyancing counsel of the company, had introduced a covenant by the trustees, for renewal, in the same form as the former covenant.

Mr. Hodgson, on behalf of the trustees, struck out this covenant, adding a proviso that the acceptance of the lease without such covenant should not prejudice the lessees in respect to any future renewal.

Mr. Polson insisted on having the covenant for renewal inserted. He offered, however, to add a proviso for cesser of

the covenant, upon the trustees conveying the legal fee to the person entitled to call for it, and upon that person giving to the company a similar covenant.

This being objected to, a bill for specific performance was filed on the 21st of June, 1821, praying that a renewed lease might be granted, subject to the same rents, payments and reservations, and containing the same grants, covenants, articles, clauses, provisos and agreements as were reserved, made payable, contained and inserted in the lease of 1788, and particularly a covenant for renewal, upon the same terms and conditions as the covenant for renewal therein contained.

The defendants, the trustees, by their answer, said, "that being interested as trustees only, they were advised that they could not take upon themselves to determine whether the plaintiffs were or not entitled to have a renewed lease granted to them, containing such a covenant for further renewal as was required by the plaintiffs, and they declined to execute such a lease, except under the direction and indemnity of the court."

On the 10th of February, 1823, the cause was heard by Sir J. LEACH, Vice Chancellor.

Mr. HART, Mr. SPENCE and Mr. POLSON, for the plaintiffs, argued, that they were entitled to have a covenant for renewal similar to that in the first lease, without which they said it would not be a lease containing the same covenants, etc., as the former leases. That otherwise the plaintiffs might be deprived of their right to a perpetual renewal, for the lessors might sell, and the purchaser might take with notice only of the lessees' limited interest, as represented on the counterpart lease, in which case he would not be bound to renew. That at all events, if a new covenant were not given, the lessees' remedy, being only upon the original lease and covenant, would be a very inconvenient description, and might be, or at least in time might become liable to be objected to on the ground of perpetuity, or as a stale demand, and that by all the authorities it appeared that the way in which a perpetual right of renewal was kept up was, by the renewal, *quoties quoties*, of the original covenant.

Mr WETHERELL, Mr. WILBRAHAM and Mr. HODGSON, on the other hand, insisted that the trustees, having no beneficial

interest, were not bound to enter into personal covenants: *Page v. Broom*, 3 Beav. 36; *Worley v. Frampton*, 5 Hare, 560; *Brooke v. Hewitt*, 3 Vesey, 255; *Willingham v. Joyce*, 3 Vesey, 168; *Beauclerk v. Ashburnham*, 8 Beav. 322; *Powell v. Lloyd*, 2 Y. & Jer. 372. That the only foundation for the plaintiffs' remedy must be the original covenant contained in the first lease, which ran with the land and would affect all subsequent owners, and that if the renewed lease contained a recital of that covenant it would bind all purchasers who would thereby have notice of the lessees' interest. That each successive renewal must be considered as a *tentative* act only toward performance of the covenant, which being perpetual in its terms could not be held to be satisfied by any limited number of compliances with it, and that it was quite settled that the doctrine of perpetuity did not apply to such a case.

The vice-chancellor expressed his opinion to be, that no such covenant as that claimed by the plaintiffs could be required from the trustees, and that the form proposed of reciting the covenant for renewal, and declaring the new lease to be granted in pursuance of it, was the proper one; and he declared, Reg Lib., 1822, A. Fol. 965, "that according to the covenant contained in the lease of 1788, the plaintiffs were entitled to a perpetual renewal of the lease of the lands," etc., etc.: *Bridges v. Hitchcock*, 5 Bro. P. C. 6; *Cooke v. Booth*, Cowp. 819; *Furnival v. Crew*, 3 Atk. 83; *Moore v. Foley*, 6 Vesey, 232; *Iggulden v. May*, 9 Ves. 325, and 7 East, 237; *Dowling v. Mill*, 1 Mad. 541; *Harnett v. Yeilding*, 2 Sch. & Lef. 556; *Brown v. Tighe*, 2 Cl. & Fin. 396; *Sheppard v. Doolan*, 3 Dr. & War. 1; *Price v. Assheton*, 1 You. & Coll. (Exch.) 82; *Smyth v. Nangle*, 7 Cl. & Fin. 405; and 3 Hurg. Juris. Consult. Exerc. 178; and he referred it to the master to approve of a proper lease according to such declaration."

A dispute arose respecting the terms of the decree, and whether the court intended to declare that the plaintiffs were entitled to a perpetual renewal; and on the 18th of March, 1823, the case was mentioned on the minutes, when the vice-chancellor said that he intended at the hearing to declare that the plaintiffs were entitled to a perpetual renewal.

The matter went into Master Courtenay's office, and on the 3rd of June, 1823, the plaintiffs' counsel consented to take the

lease without the covenant for renewal, and the lease was settled accordingly. It recited the previous lease and the original covenant for renewal at length, and the decree of the court which declared that the plaintiffs were entitled to a perpetual renewal; and it contained covenants, on behalf of the lessors, for quiet enjoyment, as against themselves and any persons claiming under them.

The master made his report, dated the 13th of June, 1823, approving of the lease so altered, which was afterward confirmed, Reg. Lib. 1822, A. Fol. 2261, and the lease was executed.

FARNUM V. PLATT.

(8 Pickering, 339. Supreme Court of Massachusetts, 1829.)

Reservation during outstanding lease. The owner of land having leased a marble quarry thereon for ten years, afterward conveyed the land to a third party, "reserving the use of the quarry until the expiration of the lease." The lease was canceled within the ten years by the parties to it: *Held*, that the reservation was not thereby extinguished, but that it would remain in force till the end of the ten years.

Passing around obstructed way. Where one has a right of way over another's land, and the way is not defined, if the owner of the land stops up the way which is in use, the other party will be justified in going over another part of the land.

Trespass *quare clausum fregit* for breaking and entering several closes of the plaintiff, and carrying away marble from a quarry in one of the closes. The general issue was pleaded; also several pleas in bar, in which a right to enter upon the closes and do the several acts complained of, is averred and claimed under title derived from a sale on execution against one Eli Garlick.

At the trial, before PARKER, C. J., the following evidence was produced: On June 24, 1820, Garlick, who was then owner of the closes described in the writ, executed an agreement with William Middlebrook, David Dell, and Stephen Mead and sons, by which they were to have the use of the

quarry for ten years, with the right of way through the closes for the purpose of going to the quarry and carrying away the marble; and the parties entered into and occupied the closes pursuant to the agreement. This agreement was not recorded. On September 14, 1822, Garlick, for a valuable consideration, conveyed the same closes to Farnum, the plaintiff, by a deed which contains the following clause: "reserving also the use of the quarry on said Burham's lot until the expiration of the lease I have heretofore made to Stephen Mead and others" (meaning the agreement before referred to). This agreement or lease was canceled on October 5, 1822, by consent of the parties to it, and the names and seals torn off.

Garlick continued to use the quarry occasionally after the canceling of the lease, under the reservation in the deed, and on November 26, 1826, his supposed right in the same was taken on execution and sold in due form to the defendant; and the acts complained of were the passing through the closes to the quarry mentioned in the reservation, for the purpose of taking marble therefrom, and repassing through the same with loads of the marble to a mill where it was to be wrought.

It was insisted by the plaintiff's counsel, that even if the defendant had any right to enter on and pass over the land and take stone from the quarry, yet that he pursued a course different from the route which had been usual. But there was evidence that the plaintiff had fenced out the old road, and that the route taken was that which would do the least injury to the plaintiff's land.

A verdict was taken for the plaintiff, which was to be set aside and the plaintiff nonsuited, if a right or interest remained in Garlick at the time of the sale on execution, which passed to the defendant; otherwise judgment was to be rendered on the verdict.

HUBBARD & HUBBELL, for the plaintiff.

C. A. DEWEY & BRIGGS, for the defendant.

PARKER, C. J., delivered the opinion of the court.

The principal question in this case is upon the construction of a clause in the deed of Garlick to the plaintiff, which is in

terms a reservation of the right to use a stone quarry upon one of the lots described in the deed.

Before the execution of this deed, Garlick, then owner of the land, had leased the quarry, with the right of ingress and egress, to Middlebrook and others, for ten years, then unexpired. The object of the reservation was to secure the rights of the lessees during the continuance of the lease; and the presumption of law is, that whatever diminution of value this occasioned to the title conveyed to the plaintiff was accounted for in the consideration paid.

This lease, or agreement, which had the effect of a lease, was, by consent of all the parties to it, canceled after the execution and delivery of the deed to Farnum, and he contends that, on such cancellation, he held the land, under the deed, free from the right secured by the reservation. We do not think this is the true construction of the reservation, but that its effect was to exclude from the operation of the grant the use of the quarry by Farnum during the time provided in the agreement for its continuance. This is the most natural construction, and such as was intended by the parties at the time. The words "until the expiration of the lease" mean until it shall expire according to the terms of it, and not the termination of it by a new agreement between the parties to it. And the reservation enures to the use of the lessor as well as the lessee, for it saves the quarry from the operation of the deed, for the time, as much as it would if the reservation had been for the unexpired time, without any mention of the lease. Therefore Garlick, or those lawfully holding under him, would not be liable in trespass for taking stones from the quarry.

And as the way used for access to the quarry was not limited or defined, the shutting up the way commonly used gave the right to pass to and from in any course least prejudicial to the owner of the land. This, according to the verdict of the jury, was done by the defendant in this case.

Plaintiff nonsuit.

JONES V. SHEARS ET AL.

(7 Carr. & P. 346; 32 Eng. C. L. R. 649. At Nisi Prius, 1836.)

¹**Fairly workable.** A tenant agreed to work a coal mine so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it: *Held*, that under these circumstances the tenant was not bound to work the mine, and that under the words "fairly workable" a tenant was not bound to work at a dead loss.

Assumpsit, on an agreement to take a colliery at a certain sleeping rent, and to continue to work it so long as it was "fairly workable." Breach—that the defendants had ceased to work it while fairly workable.

Plea—that the defendants had worked the colliery as long as it was fairly workable (concluding to the country).

It appeared that there was still coal in the mine, but that it was of such a description that it would not pay to work it.

WILSON and JOHN EVANS, for the plaintiff.

E. V. WILLIAMS, for the defendants.

COLERIDGE, J. (in summing up).

The defendants were not obliged, under this agreement, to go on working so long as there was any coal to be found; for I am of opinion that, under the words "fairly workable," they were not obliged to work at a dead loss.

Verdict for defendants.

WATSON V. O'HERN.

(6 Watts, 362. Supreme Court of Pennsylvania, 1837.)

¹**Intent, not form, determines instrument a lease.** Whatever words are sufficient to explain the intent of the parties that the one should divest himself of the property, and the other come into it for a determinate time—whether they run in the form of a license, covenant or agreement—will, in construction of law, amount to a lease as effectually as if the most proper and technical words were made use of for that purpose.

¹ *Newton v. Nock*, 7 M. R. 611.

² *Moore v. Miller*, 8 Pa. St. 272; *Gartside v. Outley*, 58 Ill. 210; *Post* MORTGAGE.

¹Implied covenant to work—Repeated actions for repeated breaches.

A lease of a stone quarry, in consideration that the lessee shall pay to the lessor a certain price per perch for all stone taken out of it, is a contract on the part of the lessee that he will work the quarry; and upon his failure so to do, the lessor may maintain covenant on the contract, and recover damages. And one verdict and judgment on such contract pending the lease, is not a bar to another when the term is further advanced.

Error to the District Court of Allegheny County. John O'Hern against Robert Watson and William Booth. This was an action of covenant upon the following agreement:

"Articles of agreement made and concluded by and between John O'Hern, of the borough of Allegheny, of the one part, and Robert Watson and William Booth, stonecutters, of said borough, of the other part; witnesseth, that the said O'Hern doth, on the conditions hereinafter mentioned, let on a lease of six years, commencing on this 5th day of February, 1834, unto the said Robert Watson and William Booth, jointly, the privilege of quarrying and hauling away all the stone they may be able to find use for during the said term of six years, and liberty to quarry the same all over the present face of said quarry and also to extend the said face as far eastward as they please along the side of Mr. Robert Campbell's premises, with the exception only of the privilege granted to Joseph Walker and partner by an article of agreement dated on the 1st of this month, which calls for the space of eighteen yards along the face of said quarry and near the middle thereof, together with the other conditions contained in said article; the remainder of the face of said quarry to be considered for the use and under the control of the above mentioned Robert Watson and William Booth for and during the said term of six years, provided they fulfill the following conditions, viz.: they agree to pay unto the said O'Hern, his heirs, etc., a quarry rent of seven cents for every perch of twenty and three fourth cubic feet of common building stone they take out, and four cents a foot for every foot of cutting stone they may get during said time, the cutting stone to be running measure for all stone not broader than eighteen inches, and all the stone which shall exceed eighteen inches wide to be cubic measure. They also agree to deposit their

¹ *Brainerd v. Arnold*, 8 M. R. 478; *Koch's App.*, 4. M. R. 151.

strippings regularly, deep on the south side of or front of the quarry, and always keep a sufficient distance, clear between the face of the rock and the stripping for a loaded wagon to pass along. They also engage to fulfill any or all of the contracts the said O'Hern may agree for, in such materials and workmanship as the conditions of such contracts call for, provided, always, that such contracts are not undertaken at a lower price than the established undertakers in this vicinity undertake such work for; say, for instance, Mr. Pegan or Mr. Smiley, etc.; the said Robert and William do also agree to render unto the said O'Hern, if required by him, orders on the proprietors of the buildings for the amount which may be coming to him for his claim for the quantity of stone in each contract, as may be conveniently ascertained, and in the space of fifteen days after the stone work is finished. It is also signified and conceded to, that provided the said Robert Watson and William Booth faithfully fulfill the conditions of this article, they shall have a new lease of the said quarry on as reasonable terms, and in preference of any other new applicants for the said property. The said O'Hern also enjoins on the parties that no liberties be taken nor injury done to either the pasture or fences of the field in which said quarry is, than strictly what is necessary for taking off the stripping on the same. It is further agreed that the said Watson and Booth shall be present to give their consent at the closing of any contracts that the said O'Hern shall make. It is further agreed, if Joseph Walker & Co. should at any time give up their bargain in said quarry, that there on condition that the said Watson and Booth shall keep four teams constantly at work during nine months every year, that then they shall have the privilege of that part which said Walker's contract calls for, together with their own."

The plaintiff thus assigned the breach of the covenant by the defendants.

By virtue of which articles of lease and agreement before recited and set forth, afterward, to wit, on the day and year aforesaid the said defendants went into the possession of and assumed the control of the said quarry. And the said plaintiff avers that although he hath always, from the time of making the said articles of agreement, hitherto, well and truly performed

and fulfilled and kept all things therein mentioned and contained on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, nevertheless, the said defendants, the covenants and agreements aforesaid, in the said articles of agreement contained as hereinbefore set forth, or any of them, on their part to be fulfilled, performed and kept, have not performed, fulfilled or kept, according to the tenor and effect, true intent and meaning thereof; the said plaintiff saith that they did not quarry and haul away all the stone they were able to find use for, during that part of said term of six years, from the 5th day of February, 1834, which was expired at the time of the impetration of this writ, but altogether neglected to quarry and haul away and use any stone from same, from the 15th day of May, 1834, and previous to the institution of this suit, and neglected to pay any compensation to the said plaintiff, for the stone, which they might have quarried, hauled away and found use for, during said period. And the said plaintiff avers that the said defendants were able to have found use for and might have hauled away from said stone quarry a large quantity of stone, to wit: — perches, during said period, which they altogether neglected to do, and which they ought to have done, according to the tenor, effect, true intent and meaning of their covenants aforesaid; and for a further breach of said covenants, the said plaintiff further saith that he, on the — day of May in the year 1834, after the execution of said articles of agreement, and before the institution of this suit, agreed and contracted with ——— M'Kelvey, for the delivery of as much stone as was necessary for the walling of a certain cellar, and which contract the said defendants, by their covenants with the said plaintiff, were bound to fulfill, and of which they, the said defendants, then and there had notice, and which they altogether refused and neglected to do, and to deliver said stone to the said ——— M'Kelvey, as contracted for by said plaintiff, by reason of which the said plaintiff saith he is injured and damaged to the value of 500 dollars.

It appeared in evidence that the plaintiff had recovered damages from the defendants, in a former action, on the same agreement.

The court below thus charged the jury: Grier president.

It is a rule of law well established, that covenants or contracts are to be construed according to their spirit and intent and that the spirit and intent are to be gathered from the whole context, and a performance which is strictly according to the letter of the covenant, if it violate the spirit's intent, is as much a breach as if it violated the letter also; and as agreements are often drawn by persons unacquainted with the technical or proper use of legal terms, no precise or formal terms are necessary to constitute a covenant. Thence the inquiry always is, what was the intention of the parties? On this subject many examples might be cited, but one or two will suffice. If I covenant to deliver so many yards of cloth, and I cut it in pieces and then deliver it, it is a breach. So, if one covenant to leave the trees on the land, and he cuts them down and leaves them there. So, in the case of *Griffith v. Goodland*, when a brewer covenanted to deliver the grains from his brewery to plaintiff for seven years, but put hops in the malt, whereby the grains were spoiled. In an action of covenant, it was objected that it would not lie, because defendant had fulfilled it to the letter by delivering the grains, and that the only remedy for the plaintiff was an action on the case for fraud; but the court held, that it was the intent that the plaintiff should have the grains for the use of his cattle; of course, that he was to have (them) in such a state that his cattle would eat them; that when hops were mixed with grains, cattle would not eat them. Therefore, though the grains were in fact delivered, so as to comply with the letter of the covenant, they were not delivered in such a state as to comply with the spirit of it, and it was consequently broken and the action maintained.

With these principles in view, let us examine this article of agreement, and endeavor, if possible, to arrive at the true meaning, spirit and intent of it, and having found this, it will be your duty to say whether the defendants have broken their contract, and what damages they should pay for such breach.

The plaintiff is owner of a stone quarry, near Allegheny town; the defendants are stone cutters. The plaintiff "lets to them on lease of six years, the privilege of quarrying and hauling away all the stone they may be able to find use for during the said term of six years, and liberty to quarry the

same all over the present face of the quarry, excepting a space of eighteen yards leased to Walker," which is "to be considered for the use, and under the control of," defendants, "during the term of six years," provided, however, that they fulfill the following conditions, viz.: "They agree to pay unto the said O'Hern, his heirs, etc., a quarry rent of seven cents a perch," etc., etc. They agree, also, to fulfill any contracts O'Hern may agree for, in such materials and workmanship as the conditions of such contract may call for, provided the terms are good and they agree to them. They agree, also, to give plaintiff orders on proprietors of buildings for amounts due him for rent. They also agree further, if the reserved part of the quarry held by Walker, be at any time given up to them, that they will keep four teams constantly employed during nine months in every year.

Now it was contended by the defendants' counsel that this is the grant of a mere privilege, to be paid for when used at a certain rate, and that the defendants are not bound to use it; have not covenanted to take out any particular quantity of stone, and that when they see fit to take them they will pay for them.

Now, this construction may, in a measure, be according to the letter of this contract, but I think no person of common understanding would say it is according to the spirit and intent of it. I may lease a man my mill for a year, and although I may absurdly call it in my lease "privilege of using my mill for a year, and grinding all the grain that may come to it," and may forget to insert in it a covenant that the lessee shall keep it going day and night, but only bind him to give me a share of the tolls, yet I think he could hardly be called an honest man, who, with such a contract would shut up my mill and put the key in his pocket, and when called on for rent, turn on his heel and say, "I covenanted to pay you a share of the tolls; I have taken none; go about your business; when I take any I will pay you your share."

But is this a mere privilege? Although called a privilege of quarrying and hauling away all the stone the defendants may be able to find use for, yet it is a lease for six years; defendants are to have the use and control of the quarry for six

years; it is in fact nothing more nor less than a lease of the quarry, uninstructed as to the quantity of stone to be taken from it; the phrase "may be able to find use for," will include as many as they can dispose of to advantage. The parties evidently contemplate that stone will be supplied to contractors or builders of houses; and as the quarry was nigh to a large and growing city, they seem to take it for granted that both parties would be anxious to dispose of as many as possible, as it would be to their mutual advantage. Now, if the defendant had shown that he got out as many stone as he could dispose of; that he had but a single team and did as much as he could; that he could not get hands to quarry, or any other reasonable excuse for not doing as much as plaintiff might expect or demand, he might well say, "I have done all I was able, and I have not contracted to do more; I have not bound myself to keep any certain number of teams going." Or if they had said to plaintiff, "We find ourselves unable to go on with this business, here is your lease, do the best you can," they might justly have called upon you to give nominal, or no damages at all, especially if plaintiff had refused to accept his lease again, knowing they could not go on with the business. But it seems that when, at the arbitration in the former suit, the plaintiff complained they would not give up the lease, the defendants did not offer to give it up except upon conditions which they evidently had no right to require.

It has been objected that a second suit will not lie on this agreement; that as no time is fixed for payment of rent, plaintiff might bring an action every day, either for an account, if not rendered, or for a breach, if the quarry is not used; that, because this would be so unreasonable, therefore the contract is satisfied by one recovery for a breach of it. But although it would be unreasonable and oppressive to have a great number of suits, it does not follow that therefore the plaintiff shall have but one; or that, because the parties have fixed no time for rendering an account or paying rent, therefore plaintiff should wait till the end of the term. The parties evidently understood that the quarry rent should be paid along as the money for the stones sold was got; that the plaintiff should have an order on the purchasers or proprietors of houses for which they were furnished. While the court will

hinder, the plaintiff, on proper application made, from oppressively multiplying suits, or would consolidate them and make him pay the costs of all but one; so they will not permit the defendant to trifle with his contract, and escape doing what is just and equitable by quibbles upon the words of his contract.

It is urged, also, that as the defendants had not covenanted to get out any particular quantity of stone, or to keep any set number of teams employed, therefore, as they had fixed no certain rule of damages, the jury can give none, or at least, but nominal damages. But this is not correct; as I have already shown, the spirit and intent of this agreement is that defendants should go on to quarry stone and dispose of them; the plaintiff is not bound to show how many might have been sold, or that defendants bought other stones, during the time for which damages are now claimed, and that plaintiff should recover just what he would have had if defendants had taken the same quantity from his quarry. The defendants have wholly refused to quarry stones; have made no attempt to an honest performance of the spirit and intent of their contract; the testimony produced by them on the trial, for the purpose of excusing themselves or throwing blame on the plaintiff, is too palpably absurd to be noticed. The jury are, therefore, to judge of what injury the plaintiff has received, by the non-performance of this contract, and not let the defendants escape altogether, by their palpable evasion, because the contract has established no exact measure of damages.

On this subject the court can only say, defendants had not covenanted what quantity shall be got out, or how many teams were to be employed; nor, although witnesses have stated that the defendants stated they intended employing their teams, are they bound to that as a measure of liability.

The defendants owned one team, they used it for a time, and afterward sold it, and ceased to go on with their contract altogether. If they had gone on with that, hauling ten or twelve perches a day, perhaps the jury may think they would have been excused if they could have done no better. It is true it may be said the plaintiff has his stones, and they are worth as much now as ever; but although that is true, as a general proposition, it might lead to a false conclusion, as

'is most evident. It will be for the jury, therefore, to say what damages the plaintiff has sustained by the total refusal of these defendants to attempt any sort of compliance with the spirit and meaning of their contract, from the 25th of June, 1834, to the 5th of February, 1835.

To which charge of the court the defendants' counsel excepted.

Verdict for plaintiff for \$170 damages.

STEWART, for plaintiff in error.

SHALER & LIVINGSTON, *contra*.

The opinion of the court was delivered by SERGEANT, J.

It is contended that by this instrument of writing the plaintiff granted and the defendants obtained nothing more than a privilege to take stone from the quarry, which they might or might not avail themselves of at pleasure, and that they were not bound to take out any stone except what the plaintiff should contract for, agreeably to the stipulation in his favor. I am disposed to think, however, that something more passed to the defendants than such a right, and that the defendants obtained, under this instrument, the exclusive right to the use, occupation and enjoyment of the demised premises during the term. The plaintiff certainly could not afterward have granted to other persons a privilege, as it is termed, or right to enter and quarry the stone. The defendants might well have complained of such an attempt, and might have sustained trespass against any person exercising the right thus claimed. If the right of the defendants were not exclusive, it might be rendered, in a great measure, valueless by the plaintiff's acts. It appears to me to be exclusive, conferring on the defendants the sole right, making them owners during the term, constituting, in legal contemplation, a lease to them of the demised premises, with the relations and liabilities between the parties of landlord and tenant. In the instrument itself different words are used to express the nature of the contract. In one part, the premises, it is said, are to be for the sole use and under the control of the defend-

ants during the term. If they fulfill the conditions they are to have "a new lease of the quarry in preference to any new applicant." Walker's part is in one place termed a privilege, and yet it is scrupulously excepted. In another part it is called his bargain in the quarry, and also his contract. It is an established rule of law that whatever words are sufficient to explain the intent of the parties, that the one should divest himself of the property and the other come into it for a determinate time; whether they run in the form of a license, covenant or agreement, will, in construction of law, amount to a lease as effectually as if the most proper and pertinent words were made use of for that purpose: 4 Bac. Abr. 161, tit. Leases, K. A license to inhabit amounts to a lease: *Id.* 11 Mod. 42; 1 Ld. Raym. 404. A license to enjoy a house or land from such a time to such a time, is a lease, and ought to be pleaded as such, though it may be pleaded as a license: *Id.* 2 Salk. 223. Words in an agreement that A shall hold and enjoy, if not accompanied by restraining words, operate as words of present demise: 5 Term. 163; Cro. Jac. 172; 2 Mod. 80. If a grant be made of a boillery of salt, the land passes, for that is the whole profit: Co. Lit. 46; Woodf. Land. & Ten. 5, 7, 8. The whole profit of a quarry consists in the right of taking out the stone, and by a grant of all that right or privilege the land passes in the same manner as land passes by a grant of all the rents and profits.

Then it is clear the parties contemplated that the quarry should be worked by the defendants to some extent, and not lie idle and unproductive to the landlord, and that extent is declared to be so much stone as the defendants should be able to find use for. They are described as stone cutters, and in the course of their trade, the parties must have presumed they would find occasion for a supply of more or less of the stone. The exact amount they would be able to dispose of could not be ascertained beforehand, because it must depend on the growth of the city and neighborhood and the consequent demand for the material. But that there would be no demand at all was not to be supposed, nor did the defendants attempt to show that to be the case. They were, therefore, free from any obligation to quarry stone from the premises, except so much as they should be able to use, or, in other

words, find demand for in their business. It would surely be a violation of the meaning and design of the lease, if they should leave the quarry entirely idle, either to work some other quarry, or for any reason short of what would legally excuse them. There is abundant evidence in the language of the lease to show that the parties contemplated the quarry should be worked. The exception of the part leased to Walker, the adjustment of the rent according to the measure of the stone taken out, the clause relating to the place of deposit of the stripping, the agreement to furnish orders on the proprietors of buildings for the plaintiff's proportion within fifteen days, the restriction of injury to the plaintiff's pasture and fences, all contemplate a working of the quarry. The exact extent is ascertained only in one event, and that was, if the defendants required Walker's part, and then they bind themselves to keep four teams constantly at work during nine months of the year.

The clause by which the defendants covenant to fulfill contracts to be made by the plaintiff seems to be only an additional obligation on the defendants and not to comprehend all that they were bound to do. Such a construction is irreconcilable with the tenor of the agreement, especially with the clause by which the defendants stipulate to furnish to the plaintiff orders on the proprietors of buildings for his amount of claim on each contract, which evidently refers to contracts made by the defendants.

If the defendants had any excuse, legal or equitable, from the responsibility thus assumed by their agreement, it lay upon them to show it. The plaintiff was not bound to prove the extent of their capacity to fulfill the contract. The lease presupposes they would work the quarry, and gives them the entire control over the premises; and being themselves acquainted with their own business and concerns, they were best able to show the extent to which they were able to work it, or if not worked at all, the reasons for their inability. Not having done so, it was for the jury to give such damages as they might deem a compensation for the loss of rent. There is, therefore, no error in the charge of the court on this subject.

Nor is the *third* error sustained. This action is for damages for non-payment of rent, and a former recovery for one

part of the term does not preclude a suit for other damages sustained by the lessee's non-payment of rent during another period of the term for which he was liable. Though the instrument sued on is the same, the causes of action are different.

Judgment affirmed.

PHILLIPS V. JONES.

(9 Simons, 519. High Court of Chancery, 1839.)

¹ **Rental enforced against lessee of unworkable mine.** Plaintiff was lessee of a coal mine at the rent of £300 a year, and subject to a royalty of 10 shillings for every wey of coals raised in each year above 600, that being the quantity considered to be paid for by the £300 a year, and he was authorized to determine the lease on the coal being worked out. Plaintiff worked the mine for several years, and when it was nearly exhausted he was prevented by accidents and defects in it from continuing work except at a ruinous expense. The court refused to restrain defendant from suing to recover the £300 a year, although the plaintiff offered to pay him 10 shillings per wey for all the remaining coal.

The plaintiff was lessee for twenty-one years, under the defendant, of a piece of ground in Monmouthshire, with liberty to dig for coals under it, at the yearly rent of £300, to be paid whether any coal should or should not be raised, and subject to a royalty of 10s. for every wey that should be raised in each year of the term over and above 600, that being the quantity considered to be paid for by the yearly rent of £300. The lease contained a proviso enabling the plaintiff to determine the term in case all the coal should be exhausted before the expiration of it.

After the plaintiff had worked the mines for some years, and had paid the defendant £2,780 in respect of the rent and royalty, he discovered that, owing to certain unforeseen defects in the mines and to accidents in attempting to work them (which were mentioned in the bill), he could not continue the working except at a ruinous expense; and thereupon he gave the plaintiff notice of his intention to determine the

¹ *Walker v. Tucker*, 8 M. R. 672.

lease, but the defendant refused to accept a surrender of it, insisting that the plaintiff was bound to get the remaining coal, and brought an action against him for the rent of £300 a year.

The bill prayed for an injunction to restrain the action, the plaintiff offering to pay the defendant 10s. per wey for all the coal which, on a reference to the master, should be found to have been under the land at the date of the lease, on being allowed what he had already paid.

Mr. Knight BRUCE, Mr. JACOB and Mr. PULLER, now showed cause against dissolving the injunction:—The object of the parties to the lease was a sale of the coal at a certain sum per wey, and the price of it is thrown over the whole term by installments of not less than £300 a year. By the terms of the lease, the plaintiff will be at liberty to determine it when the coal is exhausted; but, in exhausting it, he will ruin himself. The quantity remaining (if any), is very small, and ought it not to be considered as exhausted when it can not be gotten except at a most ruinous expense? If the plaintiff (as he offers to do), pays the defendant for the whole of the coal that was under the land, every object of the lease will be answered. Indeed, the defendant will be placed in a better situation than if he had waited for his money until the whole of the coal had been worked out: *Smith v. Morris*, 2 Bro. C. C. 311. The argument for the plaintiff in that case prevailed, and every word of it is applicable to the present case. The plaintiff was to pay for 600 weys of coal yearly, whether he raised that quantity or not, and it would be defeating all the purposes of justice, if the £300 a year, which he was to pay, were not put on the footing of a penalty: *Astley v. Weldon*, 2 Bos. & Pull. 346.

Mr. SPENCE and Mr. GILDERSTONE appeared for the defendant, but the VICE CHANCELLOR, without hearing them, said:

This case is materially different from the case of *Smith v. Morris*, for that case proceeded on this, namely, that by the terms of that lease, the lessee was bound to work the mine, and, in respect of the produce, a certain royalty was to be paid to the lessor; and it was said that the circumstances of the mine were

such that the lessee would be ruined if he were compelled to work it, and therefore it was just that he should be relieved from the covenant to work the mine, if he gave the landlord all that he could have been entitled to if the mine had been worked according to the covenant; that is, a royalty of 9s. 6d. for every wey of coals contained in the land. But this lease is constructed in a different manner. In the first instance there was to be paid, yearly, during the term of twenty-one years, a gross sum of £300 whether the coal was worked or not, and a royalty of 10s. per wey was to be paid if more was raised than 600 weys; and there was a covenant in the lease which bound the lessee to work the mines. Then came a proviso enabling the lessee, on giving notice, to determine the lease when all the coal should be worked out; and consequently, when all the coal should be exhausted, the tenant might, by giving the required notice, free himself from all the obligations of the lease.

If an action had been brought, on the covenant, to compel the plaintiff to continue the working of the mines, and there had been no other reservation in the lease than a royalty of a certain sum per wey on all the coal raised, then the court would have applied the principle of *Smith v. Morris*, and would have relieved the plaintiff from the expense of working an unprofitable mine, on his paying the defendant for all the coal under the land, which would, in substance, be giving him all that he was entitled to under the lease; for he could derive no benefit from compelling the plaintiff to continue the working of the mine. In this case, however, there is a fixed sum of £300 a year to be paid, whether the mines are worked or not; and therefore the court can not relieve the plaintiff from the payment of that sum. The consequence is that the order for dissolving the injunction, so far as it restrains the action on the covenant to pay the £300 a year, must be absolute.

TALBOT V. FORD.

(13 Simons, 173. High Court of Chancery, 1842.)

Unconscionable covenants not aided in equity. Lessee of mines covenanted that if the lessor should at any time before the expiration or determination of the lease give notice in writing to the lessee of his desire to take all or any part of the machinery, stock in trade, implements, etc, in and about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified to the lessor on his paying the value, such value to be fixed by arbitration. *Held*, that the covenant was so injurious and oppressive to the lessee that the court ought not to interfere by injunction to prevent its breach.

The plaintiff was the lessor, and the defendant, Digby, was the lessee, of certain mines in Wales, for thirty-one years from the 25th of March, 1837. The lease contained a covenant on the part of the lessee, that in case the plaintiff, his heirs or assigns should, *at any time before the expiration or sooner determination of the lease*, give to Digby, his executors, etc., notice in writing of his desire to take, at a valuation, all or any part of the movable machinery, going gear, stock in trade, implements, utensils, articles and things in or about the mines, then Digby, his executors, etc., would, on the expiration or determination of the lease, deliver to the plaintiff, his heirs or assigns, all or such part of the said movable machinery, etc., as should be specified in the notice, and thereupon the plaintiff, his heirs or assigns, should pay to Digby, his executors, etc., the fair value of the articles so delivered, such value to be settled by arbitration.

In 1841 Digby assigned the machinery, implements, utensils and other articles in and about the mines, to the defendant Ford, as a security for money lent.

In 1842 Ford advertised the articles for sale, in pursuance of a power for that purpose contained in his security. Shortly afterward the plaintiff, without having taken any step to determine the lease, served Digby with a notice in writing, expressing his desire to take, at a valuation to be made according to the covenant, such part of the movable machinery, going gear, etc., in and about the mines, as was mentioned in

the notice, and then filed the bill in this cause, praying that it might be declared that he was entitled to have the covenant specifically performed, and that Ford might be restrained from selling or removing the articles mentioned in the notice.

Mr. BETHELL and Mr. W. M. JAMES, now moved for the injunction.

Mr. WAKEFIELD, Mr. G. RICHARDS, and Mr. CHANDLESS, opposed the motion.

They said, first, that, under the covenant which the bill sought to enforce, the lessor might give notice, shortly after the commencement of the term, of his desire to purchase the stock in trade, or any of the other articles mentioned in the covenant, and thereby prevent the lessee from disposing of his stock in trade or of any of the other articles specified in the notice, until the end of the term; and that such a covenant was so hard and unreasonable, that the court would not give effect to it: *Kimberley v. Jennings*, 6 Sim. 240; secondly, that the court would not act upon an agreement to purchase property at a price to be fixed by arbitrators: *Gourlay v. The Duke of Somerset*, 19 Ves. 429.

THE VICE-CHANCELLOR.

It is not unusual to insert in leases of mines, a covenant which enables the lessor to purchase machinery and other articles belonging to the lessee and used by him in working the mines, on the lessor giving notice of his desire to purchase them, shortly before the expiration of the lease; so that the lessor's option of purchasing the articles, is, of necessity, confined to such as may be in or about the mines at the expiration of the lease. But the covenant on which the present motion is founded, enables the lessor, at any time after the commencement of the term, to put, as it were, a *ne amoveas* upon the lessee's stock in trade and other articles used by him in working the mines; that is, it enables the lessor to defeat, to a considerable extent at least, the object and intention of the lessee in taking the lease. For I do not see how,

consistently with the power which this covenant purports to give to the lessor, the lessee can work the mines to any advantage. It seems to me that it was by mere want of caution that this covenant was worded as it is, for I can not suppose that the parties could have intended that it should be expressed in the unqualified terms in which we find it. But, be that as it may, my opinion is that it is so injurious and oppressive to the lessee, that this court ought not to interfere for the purpose of giving effect to it, and therefore I shall not grant the injunction.

FOLEY ET AL. V. ADDENBROOKE ET AL.

(13 M. & W. 174. Court of Exchequer, 1844.)

¹**Covenant as to mixing ores.** A lessee of iron works and mines covenanted to work the furnaces effectually, unless prevented by inevitable accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself or *with a proper mixture*, or process, make good, common pig iron: *Held*, that the mixture intended was not necessarily of ore procurable on the demised premises.

Alternative rent covenants—Double recovery not allowed. Where the lease contained a covenant to raise a certain quantity of ironstone during each quarter, and pay certain royalties upon it, *or else* to pay a certain fixed quarterly rent: *Held*, that the landlords, having declared upon breaches of both the above covenants, and money having been paid into court and accepted in satisfaction of the latter, were entitled to nominal damages only in respect to the former.

²**Removal of machinery—Fixtures.** The lease contained a covenant to repair and yield up the furnaces, fire engine, iron works, dwelling houses and all other erections, buildings, improvements, etc., *except the iron work, castings, railways, etc., machines, etc.*; *Held*, that the lessees had the right to remove whatever was a machine or in the nature of a machine or part of a machine, but not what was in the nature of a building or support of a building, although made of iron.

Injury to freehold by removing machinery. In removing from iron works machinery, etc., allowed to be removed, the lessees may disturb such brick work as is necessary, and are not bound to restore it to a perfect state, being liable in damages for any unnecessary disturbance of such brick work.

¹*Humphreysville Co. v. Vermont Copper Co.*, 33 Vt. 92.

²*Wake v. Hall*, 6 M. R. 119.

This was an action of covenant, which came on to be tried at the summer assizes for the county of Stafford, in 1843, before WILLIAMS, J., when a verdict was taken for the plaintiffs for the damages in the declaration, subject to the opinion of this court on the following case, which was stated by a gentleman at the bar, to whom the matter was referred for that purpose.

This action was brought by Edward Thomas Foley, Esq., and Sir Edward Dolman Scott, Baronet, as the respective heirs of Eliza Maria Foley and Mary Whitby, against the defendants, as the assignees of J. A. Addenbrooke, to recover damages for the breach of certain covenants contained in an indenture of lease, bearing date the 8th day of January, 1799, and made between one Edward Foley and the said Eliza Maria, his wife, and the said Mary Whitby, of the one part, and the said J. A. Addenbrooke, of the other, whereby the said Edward Foley and the said Eliza Maria, his wife, and the said Mary Whitby demised unto the said J. A. Addenbrooke, his executors, administrators, and assigns, first, a close of land therein described as being part of two certain pieces of land called or known by the several names of Long Meadow and Near Moor Croft, and, secondly, a certain other close of land called or known by the name of the Roundabout, being part of a certain farm called Bradley Hall farm, situate and being at Bradley, in the county of Stafford, together with certain powers, liberties, licenses and authorities in the said indenture mentioned, for a term of forty-two years, to commence from the 25th of December then next ensuing. And the said indenture contained, amongst other covenants and provisions, a covenant by the said J. A. Addenbrooke, the lessee, to erect a furnace and iron works thereon; and in case sufficient ironstone could be got to supply another furnace, to erect a second furnace within ten years, for the purpose of making and smelting iron; and from time to time, and at all times during the said term thereby demised, to carry on and effectually work the said furnace and iron works, and second furnace, as the case might be, without intermission or loss of time, save only for such time and times as there should be absolute necessity for stopping or discontinuing the said furnaces and iron works for repairs or alterations, or from any other unavoidable accident that might hap-

pen to the same, or the want of supply of necessary materials for carrying on the same, or in case the ironstone to be got or raised by the said J. A. Addenbrooke, his executors, administrators or assigns, from and out of the lands and grounds of the said Edward Foley and Eliza Maria Foley, his wife, and the said Mary Whitby, as thereafter mentioned, should be insufficient in quantity to supply the said furnaces or iron works, or would not by itself, or with a proper mixture and process in the smelting or manufacturing thereof, make good pig iron.

Upon this last covenant the plaintiffs assigned a breach in the following words: "That on the first of January, 1816, and on divers days and times between that day and the expiration of the lease, the said furnaces and iron works were not, nor was either of them, carried on or effectually worked without intermission or loss of time, although on those days and times, or any of them, there was no necessity for stopping or discontinuing the said furnaces and iron works, or any part thereof, for repairs or alterations, or from any unavoidable accident, or the want of supply of necessary materials for carrying on the same, and although at all those days and times the ironstone to be got and raised from and out of the lands and grounds in the said indenture mentioned was sufficient in quantity to supply the said furnaces and iron works, and such ironstone could by itself, and with a proper mixture and process in the smelting and manufacturing thereof, make good common pig iron."

To this breach the defendants, after oyer of the indenture of lease, pleaded, first, performance of the covenant; secondly, that defendants were prevented from carrying on the furnaces by necessary repairs and unavoidable accidents, and the want of necessary materials; thirdly, that the ironstone was not sufficient in quantity nor quality to make good pig iron.

The said J. A. Addenbrooke, the lessee, after the execution of the said lease, entered upon the demised premises, and in compliance with his covenant erected thereon, within the first year of the said term, one good, sufficient, and substantial furnace or iron work called furnace No. 1, and a fire engine, for the purpose of smelting iron, with sufficient other necessary erections and buildings for carrying on the iron trade; and within the first ten years of the said term, also erected a

second furnace, No. 2, for the purpose of making and smelting iron as aforesaid; and the said furnaces and iron works were, and each of them was, carried on and effectually worked without intermission or loss of time, according to the true intent and meaning of the said covenant, by the said J. A. Addenbrooke in his lifetime, and by the defendants after the decease of the said J. A. Addenbrooke, until the last year of the said term. But in the month of May in that year, the defendants caused the furnace No. 2 to be put out; and in the month of August following, they caused the furnace No. 1 to be also put out; and from the month of May till the month of August in that year the furnace No. 1 alone was in work; and from the month of August to the end of the term both furnaces had ceased to work. At the times that the furnaces were extinguished by the defendants as aforesaid, there was no necessity for stopping or discontinuing the said furnaces, or either of them, for any necessary repairs or alterations, or by reason of any unavoidable accident; but if the said furnaces had been kept in work up to the last day of the said term, it would not have been possible for the defendants to have exercised during the term any right they might have, either under the provisions of the lease or at common law, of removing the machinery and fixtures belonging to the said furnaces and iron works. The space of time, however, between the month of August and the end of the term was longer than was absolutely necessary for the purpose of removing the same. Neither was there any necessity for stopping and discontinuing the said furnaces, or either of them, by reason of the want of supply of necessary materials for carrying them on, unless the court shall be of opinion that the following facts amount to a want of supply of necessary materials.

The said indenture, besides the demise of the above mentioned closes of land, also contained a demise to the said J. A. Addenbrooke, his executors, administrators and assigns, of all and singular the mines and veins of ironstone in and under the demised closes, and also under certain other closes of the lessors mentioned and described in the said indenture of lease, but not demised thereby, with liberty from time to time, and at all times during the continuance of that demise, to en-

ter into and upon the said lands and premises, and there to work the said mines of ironstone for a like term of forty-two years, commencing, as aforesaid, at the rent of 3s. a bloom for each and every bloom of ironstone (other than and except for the refuse ironstone therein mentioned) and so on in proportion for any greater or less quantity than a bloom, which the said J. A. Addenbrooke, his executors, administrators or assigns should, from time to time during the continuance of that demise, raise or get out of the aforesaid lands or mines, each bloom to be of the weight therein mentioned, to be paid and payable by four equal quarterly payments in each and every year of the said term. And the said J. A. Addenbrooke further covenanted to pay the sum of 3s. for each and every bloom of ironstone as aforesaid, which he, the said J. A. Addenbrooke, his executors, administrators and assigns should from time to time raise and get out of the said mines thereby demised; and also quarterly and every quarter of a year during the continuance of that demise, to raise and get from and out of the said mines thereby demised, (if there to be found,) not less than 780 blooms of ironstone, and as much more, quarterly and annually, as the said furnaces and works should or might use or consume, or otherwise to pay to the said Edward Foley and Eliza M. Foley, his wife, and the said Mary Whitby, and the heirs and assigns of the said Eliza M. Foley and Mary Whitby, respectively, the sum of £468, by way of rent for the said mines of ironstone, yearly, during such part of the said term that the said J. A. Addenbrooke, his heirs, executors, administrators or assigns, should not raise or get 3,120 blooms of ironstone out of the mines thereby demised, in case the said mines, if worked according to the true intent and meaning of the said indenture, would produce that quantity annually.

The same to be paid and payable by four equal quarterly payments in every year, in manner thereinbefore mentioned.

(The case then stated that the lessors were owners of the coal underneath the demised lands and the other closes of land, and at the time of the demise were working the coal pits there; and there was an exception out of the demise of the coal under the demised land, with power to the lessors to get and sell the same; with a proviso that nothing should author-

ize the lessee to get ironstone under any of the lands where the getting of the same might prejudice the lessors in getting the coal.)

And the said indenture also contained a covenant by the said J. A. Addenbrooke to buy of and take from the said lessors, and their respective heirs and assigns, from the mines and coal works at Bradley aforesaid, weekly and every week, from time to time and at all times during the continuance of that demise, at least two hundred tons weight of coal of the description and qualities therein mentioned, and also all such further quantity of coal of the quality and description and weights therein mentioned, and also all the small coal that the said J. A. Addenbrooke, his executors, administrators or assigns, should, from time to time during that demise, use or consume at the said intended furnaces and iron works, in case the said lessors and their respective heirs could supply the same from the said works at Bradley aforesaid, and not of any other person or persons whomsoever, to be paid for at certain prices therein mentioned; with a covenant by the said J. A. Addenbrooke, his executors, administrators or assigns, not to buy, fetch, use, burn, consume or employ any coal or ironstone as aforesaid at the said furnace, iron works and other works erected on the said demised lands and premises, pursuant to the covenants thereinbefore contained, or in or about any of the manufactories there carried on, or which he, the said J. A. Addenbrooke, his executors, administrators or assigns, should be in anywise concerned or interested in, upon the said thereby demised premises, from any other colliery or collieries, mine or mines, belonging to any other persons whomsoever other than the said lessors and their heirs and assigns, in case they could get and raise sufficient and proper coal, and a sufficient and proper quantity and quality of ironstone could be got or found in the mines thereby demised; and except at such time and times only as the said lessors, and their respective heirs and assigns, should not be able to supply the said J. A. Addenbrooke, his executors, administrators and assigns, with a sufficient quantity of coals of the description aforesaid; and also except such Lancashire or other iron ore as the said J. A. Addenbrooke, his executors, administrators and assigns, might have occasion to use at the said furnaces

and iron works for the better fluxing and improving the said ironstone to be raised out of the said mines, not thereby lessening the quantity of 3,120 blooms to be annually got and raised out of the said premises thereby demised.

The said indenture also contained a corresponding covenant by the lessors, at all times during the continuance of the demise to continue to work the mines then open, and raise and get the thick coal in and under the several closes of land thereinbefore mentioned, and to sell and deliver to the lessee at least two hundred tons of coal weekly, in case they could get and raise so much from the said works; and not to sell to any other person until they should have supplied the lessee.

The case then stated that the lessors, and, after their decease, the plaintiffs, continued to raise the coal during the lease, and at the time of the alleged breach were occupiers of the coal pits; and that they failed to supply sufficient coal, but supplied all that could be got from the pits; and the defendants were able to procure coals from other collieries at the market price.

At the time of the alleged breach of covenant, there was not any insufficiency in the supply of ironstone from the said demised mines, there being, at the time that the furnaces were put out, between twenty and thirty acres of ironstone ungot, which the defendants might have got for the supply of the furnaces.

The ironstone so remaining ungot was of a kind called new mine, and incapable of making salable pig iron without the mixture of a richer ore called blue flats, or of an ore called Lancashire ore, but no blue flats or Lancashire ore were produced from the mines demised to the defendants as aforesaid, and the new mine stone had been got and smelted by the defendants and their predecessors from the same mines for many years prior to the year 1841, and the time of the said alleged breach of covenant; but, at the commencement of the lease, and for a long period during the lease, a richer ore, called the "gubbin stone," lying nearer to the surface, and above the new mine, was got and smelted by the defendants, and it was not till the exhaustion of the gubbin stone that they began to work the lower stratum of inferior ore called new mine.

The plaintiffs, in their declaration, also assigned breaches

on the several covenants by the lessee to pay the rent of 3*s.* a bloom for every bloom of ironstone to be got during the term, and also to raise not less than 780 blooms of ironstone per quarter, or to pay £468 yearly, by way of rent, every year that he should not raise 3,120 blooms of ironstone.

On these breaches the defendants paid money into court, which the plaintiffs took out in satisfaction of the same, and the defendants have in fact paid 3*s.* per bloom for every bloom of ironstone actually raised by them during the last year of the said term, and also the sum of £468 in respect of the quantity by which the amount raised in that year had fallen short of 3,120 blooms. But the two furnaces, if both of them had been effectually worked during the whole of the last year of the term without intermission, would have consumed a far greater quantity than 3,120 blooms of ironstone.

The said indenture also contained a further covenant, that he, the said J. A. Addenbrooke, his executors, administrators or assigns, should and would, from time to time, and at all times during that demise, well and sufficiently repair, amend, maintain, scour, cleanse, preserve and keep in good, sufficient and tenantable order and repair, all the gates, rails, stiles, hedges, ditches, mounds and fences of and belonging to the said hereby demised lands and premises, and the furnace and furnaces, fire engine, iron works, dwelling houses and other erections and buildings to be erected and built by the said J. A. Addenbrooke, his heirs, executors, administrators or assigns, on the said demises lands and premises, he and they being allowed to get clay (other than and except fire clay), from time to time upon the said premises, if there to be found, for making of bricks, tiles and other articles for erecting, building, altering and repairing the said furnace and furnaces, fire engine and other erections and buildings, or otherwise, for the use of the works to be carried on by the said J. A. Addenbrooke, his executors, administrators or assigns, and to be used on the premises only; and the said furnace and furnaces, fire engine, iron works, dwelling houses and all other erections, buildings, improvements and alterations, to be thereafter erected, built or set up (except the iron work castings, railways, gins, winseys, machines and the movable implements and materials used in or about the said

furnaces, fire engines, iron works, stone pits and premises), so repaired, amended and kept in repair as aforesaid, should and would, at the expiration or other sooner determination of the lease, quit, leave, surrender and yield up into the hands and quiet possession of the said lessors, without any molestation, hindrance or interruption whatsoever. Upon this the plaintiffs assigned a breach in the words of the covenant, that the defendants did not repair nor leave in repair at the end of the lease, but, on the contrary, part of the furnaces, etc., being other than the iron work, etc., was by the defendants wrongfully pulled down and removed, and the furnaces, etc., being other than the iron work, etc., were suffered to be and continue, and at the expiration of the lease were left, in bad order and condition for want of repair.

To this breach the defendants pleaded, first, a special traverse of the breach, and averred that the defendants did well and sufficiently repair the said gates, etc., and the said furnaces, fire engines, iron works, etc., and yield up the same so repaired, other than the iron work castings, etc., according to the covenant, *absque hoc*, etc; secondly, that the said matters and things in that breach complained of were, and each and every part thereof was done and occasioned under, by virtue, and in execution of the said powers, rights, liberties and privileges granted and reserved to the said J. A. Addenbrooke in and by the said indenture of lease in the said declaration above mentioned; thirdly, as to so much of the breach of covenant secondly above assigned as relates to the said gates, etc., and to the said residue of the furnaces, fire engine, iron works, dwelling houses and other erections and buildings, the defendants say, that they, the said defendants, would have kept and performed their said covenant with regard to the same and every part thereof, if the plaintiffs had not entered and come into possession of the said demised lands and premises and obstructed the defendants as hereinafter mentioned. And the defendants, in fact, say that the plaintiffs did, before the time of committing so much of the said breach of covenant as in the introductory part of this plea is mentioned, or any part thereof, to wit, on the first day of January, 1836, and on divers other days and times between that day and the day of the expiration of the said demise, with carts, carriages,

horses and workmen, enter and come into and upon the said demised lands and premises, and put and place divers large quantities of dirt, ashes, rubbish, coal and other substances upon the said demised lands and premises, and near to, in and upon the said gates, rails, stiles, hedges, ditches, mounds and fences, and near to, about, in and upon the said residue of the furnaces, fire engine, iron works, dwelling houses and other erections, and incumbered, choked up, injured and destroyed the same, and kept and continued the same so incumbered, choked up, injured and destroyed, for a long time, to wit, till the expiration of the said demise; and they, at the said times in the second breach mentioned, hindered and prevented the defendants from performing their said covenant, as to so much thereof as they are alleged to have broken in the part of the said breach by the plaintiffs secondly above assigned. The fourth plea was, as to so much of the breach as relates to the residue of the furnaces, etc., that the plaintiffs wrongfully mined under the demised lands in the breach mentioned, and under the lands adjoining thereto, by reason whereof the residue of the said furnaces, etc., became out of condition without the default of the defendants, whereby they were hindered from performing their covenant.

The plaintiffs joined issue on the first of these pleas; to the second they replied, denying that the matter and things alleged in the breach were done or occasioned under or by virtue or in execution of the powers, rights and privileges granted and reserved to the said J. A. Addenbrooke by the said lease; and to the third and fourth pleas they replied *de injuria*.

Besides the said two furnaces hereinbefore mentioned, the defendants also built on the first demised close of land very extensive iron works, consisting of casting houses and a forge and mill, together with refineries, furnaces, warehouses, sheds, and buildings necessary and requisite for carrying on the iron trade, and they also built necessary houses for workmen to reside in to carry on the intended iron works,

The indenture of lease contained a proviso, that at the end, expiration, or other sooner determination of the demise, the lessors and their respective heirs should, upon their giving six months' previous notice, in writing, of their intention,

whether they would purchase or not, to the said J. A. Addenbrooke, his executors, etc., have an option of purchasing the several iron castings, railways, gins, winseys, boilers, machines and movable implements and materials then in use, or being in or about the said furnaces, fire engine, iron works, stone pits, lands and premises, at a price to be determined in the manner therein mentioned; and, in the event of their neglecting to avail themselves of their option in that behalf, then it should and might be lawful to and for the said J. A. Addenbrooke, his executors, administrators and assigns, to remove and carry away, for his and their own use and benefit, all and every the said several iron castings, railways, gins, winseys, boilers, machines and movable implements and materials then in use, or being in or about the said furnaces, fire engine, iron works, stone pits and premises.

A gin is a windlass fixed in the ground and worked by a horse, for the purpose of drawing minerals out of a mine; a winsey is a machine of a similar kind, used for the same purpose, but worked by a steam engine.

The plaintiffs did not avail themselves of the said proviso, nor give to the defendants any notice of purchasing the above mentioned articles, and the defendants, before the expiration of their lease, disannexed from the freehold and took away the several articles hereinafter enumerated and particularly described, and in so doing injured and damaged the said furnaces and iron works.

First. A blast steam engine, or fire engine, forming, together with its boilers, regulators and hot air apparatus, one mechanical contrivance for blowing the said furnaces by means of a hot blast.

The boilers of the engine were made of wrought iron and rested on foundations of brick work, called the boiler seats, and were built in and surrounded by flues of brick work, lined with fire brick, proceeding from the boiler grates for the purpose of conveying the flame underneath and around the boilers. The surrounding and superincumbent brick work of the flues held the boilers firmly fixed in their seats, so that they could not be removed without taking away the flues. The boiler grates consisted of bearers of cast iron, set in brick work, with cross-bars and a door-frame and a door also of cast iron.

The defendants took away the boilers and the grates, and pulled down the flues and took away part of the bricks from the seats of the boilers. A pipe called the steam pipe proceeded from the boilers to the steam cylinder of the engine, connecting the boiler with the engine.

The blast engine was erected in a separate building called the engine house, and consisted of a cast iron cylinder called the steam cylinder, resting upon a basement of solid brick work, to which it was fixed by rods of wrought iron, screwed at one end into the bottom plate of the said cylinder and at the other into plates of cast iron let into the bottom of the brick work on which the cylinder rested. From the top of the steam cylinder proceeded a rod of iron called the piston rod, which, by the action of the steam in the steam cylinder, worked the beam of the engine; this latter was supported by an erection of brick work, called the lever wall, on the top of which were certain carriages of cast iron, called the beam carriages, in which the beam of the engine worked, which were fixed to the lever wall by similar rods of wrought iron, screwed at one end into the bottom plates of the beam carriages, and at the other into holding-down plates let into the lever wall at the bottom.

The beam carriages were also attached by means of screws to two large beams of timber called the spring beams, placed parallel to the beam of the engine, and supported by the lever wall in the center, and by the external walls of the engine house at their extremities; the parallel motion apparatus was also screwed to the spring beams. A rod proceeding from the other end of the beam of the engine worked another cylinder, called the blowing or blast cylinder, situate on the opposite side of the lever wall to the steam cylinder. This was also supported by a similar basement of brick work, to which it was fixed by means of holding-down rods and holding-down plates, in precisely the same way as the steam cylinder. The engine beam had been formerly made of wood, but, at the time of the removal of the engine by the defendants, was of cast iron. The rest of the engine consisted of the air-pump, condenser, machinery and gear of the engine.

The term "steam engine" or "fire engine," is applicable to the whole structure, including the brick supports of the

cylinder, the lever wall and the spring beams, as well as to the cylinders, gear, and machinery of the engine. In this sense the spring beams were the timber parts of the engine, and the lever wall and the supports of the cylinders, the brick parts of the engine, and the residue, the metallic parts of the engine, but the brick work and timber were merely supports to the mechanical parts of the engine, which were made of metal exclusively. The metallic parts of the said steam engine were made of cast iron and wrought iron, with some small portion of brass, and the cast iron parts would be properly described as the castings of the engine, and those made of wrought iron as the iron work of the engine. These terms are correctly applied to all articles made of cast iron or wrought iron respectively, whether forming parts of machinery, or attached to buildings, or loose, and castings means made of cast iron, and iron work means wrought iron.

By taking out the rods which affix the cylinders and the beam carriages to the holding-down plates, and by taking out the screws which fix the beam carriages and the parallel motion to the spring beams, the whole of the mechanical part of the engine might be disattached without injury to the structure. But the holding-down plates, being let into the brick work, could not be removed without injury to the brick work, and the spring beams could not be removed without damage to the external walls and floors of the engine house. The defendants took out the holding-down plates and removed the two cylinders, the beam carriages and the beam of the engine, and all the gear, machinery and metallic parts of the engine; they also took away the spring beams. In detaching the cylinders and the beam carriages they disturbed and injured the brick work of the lever wall and pulled down a portion of the external wall of the engine house in removing the spring beams and getting out the blowing cylinder and the engine beam.

[The arbitrator then went on to describe the water regulator, the dry regulator, the hot air apparatus, the hoops and bearers of the furnaces, the refineries, the cupola and the puddling furnaces.

[The arbitrator then stated that the blast furnaces, refineries, cupola, puddling furnaces and mill furnaces are all of them

erections requisite and necessary for the iron trade, and the making of iron and the smelting of iron ore, and the manufacturing of iron, and iron works would not be complete, and the process of manufacturing iron could not be carried on without them.

[He then described the forge engine and mill engine, the foundation of the forge hammer and shears, the frames of the mill wheels and frames and bed plates of the rolls, the cast iron columns supporting the roof of the mill and the gasometer.

The arbitrator then stated that all of these buildings had foundations let into the ground, and were erected as conveniences to the defendants' iron works.]

The whole of the above buildings were removed by the defendants, and the value of the whole is £112 3s.

There has also been a breach by the defendants of their covenant to keep the furnaces, iron works and dwelling houses in repair, beyond what may have been occasioned by the removal of the articles above enumerated, and the defendants have not been prevented from performing their covenant, so far as relates to the repairs of the said furnaces, iron works and dwelling houses, by reason of the matters and the things by them alleged in their third plea to the said breach. But the plaintiffs, during the lease, mined and got coals under certain closes of land belonging to the plaintiffs, adjoining to the close of land on which the said furnaces and iron works and dwelling houses were erected, and by so doing injured certain of the buildings forming part of the said iron works, and certain of the houses of the workmen, but such mining, and all injury from the same, had ceased long before the expiration of the lease. After the expiration of the lease, the plaintiffs again commenced getting the coal lying underneath the said closes of land and in so doing greatly injured the said furnaces, iron works and buildings, after the expiration of the lease. But the plaintiffs have sustained damage by reason of the breach by the defendants of their covenant to keep the furnaces, iron works and dwelling houses in repair, beyond what has been occasioned by the removal of the said articles, and exclusive of all injury occasioned to the said buildings, or any of them, by reason of mining by the plaintiffs, which amounts to the sum of £280 16s. 8d.

The questions for the opinion of the court are: First, whether there has been any breach by the defendants of their covenant to carry on and effectually work the said furnaces and iron works.

And if the court shall be of opinion that there has been a breach of that covenant, then, whether the plaintiffs have sustained more than nominal damages by reason thereof, and if the court shall be of opinion that the plaintiffs have sustained more than nominal damages, then their damages in respect of such breach are to be considered as assessed at the sum of £117.

Secondly, whether the defendants are entitled to remove all or any, and, if any, which, of the articles above enumerated and described.

The court to direct a verdict to be entered on the several issues joined in the cause.

The plaintiffs' points were as follows: The plaintiffs mean to contend, that, according to the findings of the special case and the true construction of the documents therein mentioned, they are entitled to have a verdict entered for them upon all the issues, with the damages respectively applicable to each, as ascertained by the case.

They will also contend that, not only has there been a breach by the defendants of their covenant to carry on and effectually work the said furnaces and iron works, but that the damages occasioned thereby to the plaintiffs are substantial, and ought to be assessed at the sum of £117.

They will also contend that the defendants were not entitled to remove any of the articles enumerated in the case; that the damages thereby occasioned to the plaintiffs are substantial, and ought to be assessed according to the value of the respective articles, and the injuries occasioned by the wrongful removal thereof by the defendants; and they will also contend, if the court should be of opinion that any of the said articles were not wrongfully removed by the defendants, that the manner of the removal of such articles and of all the articles by the defendants occasioned substantial damage to the plaintiffs.

The defendants' points were, that the facts stated on the case show that they are entitled to a verdict on the second

and third pleas, for that the case finds a deficiency of coal, being necessary materials within the meaning of plea 2, and that the ironstone was not of sufficient quality within the meaning of plea 3.

And the defendants will contend that, if there have been any breach of the covenant to which those pleas are pleaded, the damages resulting from it are but nominal, since the only damage the plaintiffs could sustain by the furnaces ceasing to work was a loss of a market for their coal or the loss of the royalties upon the ironstone; but they have refused to supply the former, and have received the rent stipulated as a compensation for the latter.

And the defendants will contend that all the articles enumerated and valued are removable at common law, as between landlord and tenant, and that there is nothing in the lease to control the application of the common law, as above stated, to them, but that, on the contrary, the lease expressly authorizes their removal. And the defendants will contend that having a right to remove them they had a right to disturb as much of the brick work as was necessary for that purpose, and that if any excess was committed it ought to have been new assigned in answer to the fifth plea.

The case was argued in Easter term last by WHATELEY for the plaintiffs, and by ERLE for the defendants; the court took time to consider, and their judgment was now delivered by POLLOCK, C. B.

This action was brought for the breach of the covenants contained in a lease of ironstone mines, and the first breach was for not effectually working them. The pleas to that breach were, first, that the furnaces and ironworks were effectually worked without intermission or loss of time. The second was, that the defendants were prevented by necessary repairs and unavoidable accident from working the mines. The third was, that the ironstone got and raised was not sufficient in quantity and quality to make good common pig iron. There was a second breach in not raising 3,120 blooms of ironstone, or paying the sum of £468 per annum, and upon that breach money was paid into court according to the rate of payment claimed and for the time for which it was claimed, and that money has been taken out by the plaintiffs in satis-

faction of that breach. That breach, therefore, is gone. The third breach was in not repairing and leaving in repairs. The pleas to that were, first, that everything was left in repair, other than and except certain matters which the defendants had a right to take away. The second was, that what was done was done in execution of the lease: that was traversed. The third was, that the plaintiffs hindered the defendants; and the fourth, that the plaintiffs undermined the ground; to those pleas there was a replication *de injuria*. The arbitrator has a variety of facts very simple upon his award; and the court is called upon to direct in what manner the issues shall be entered, and further, to say upon which of the various items, very considerable in number, the plaintiffs are entitled to recover from the defendants.

With respect to the manner of entering the issues, it appears to us, that upon the first plea to the first breach, indeed upon all the issues joined, the verdict is to be entered for the plaintiffs.

It is clearly found by the arbitrator that the furnaces were not effectually worked; in fact they were stopped for the last six months before the lease expired.

With respect to the second plea, that the defendants were prevented by necessary repairs and unavoidable accident, and by reason of the want of necessary materials, from working the mines, the arbitrator expressly finds that there is no foundation for that plea.

With respect to the third, that the supply of ironstone was not sufficient in quantity or quality, there is no doubt that it was sufficient in quantity; and the question turns upon this: whether the quality of the iron was, within the meaning of the lease, sufficient to make good pig iron. Now upon this point it will be necessary to refer to the condition of one of the clauses in the lease: "And shall and will from time to time, and at all times during the said term hereby demised, carry on and effectually work the said furnace and ironworks and second furnace, as the case may be, without intermission or loss of time, save only for such time and times as there shall be an absolute necessity for stopping or discontinuing the said furnace and ironworks for repairs or alterations, or from any other unavoidable accident that may happen to the

same, or the want of supply of necessary materials for carrying on the same; or in case the ironstone be got and raised by the said J. A. Addenbrooke, his executors, administrators, or assigns, from and out of the lands and grounds of the said Edward Foley and Eliza Maria Foley, his wife, and Mary Whitby, as hereinbefore mentioned, shall be insufficient in quantity to supply the said furnaces or iron works, or will not by itself or with a proper mixture and process in the smelting or manufacturing thereof make good common pig iron." That is the clause in the lease upon which the verdict turns with respect to the third issue; and it appears to us that it was not necessary that the proper mixture for the purpose of smelting or manufacturing iron should be found upon the premises demised to the defendants, but was to be procured by them as some of the articles to be used in their trade as manufacturers of iron; and, in accordance with that, it appears that the parties had so dealt with the covenant themselves for a considerable number of years, while the lease was in operation. I am now stating merely in what manner the verdict is to be entered. I will come to the damages presently.

To the third breach, for not repairing and leaving in repair, the pleas were, first, that everything was left in repair other than the articles that were allowed to be taken away. It is quite clear upon the award that there were other matters as to which the premises were not left in proper repair, and therefore that issue must be found for the plaintiffs.

With respect to the second, that what was done was done in the execution of the lease, certainly much was done in the execution of the lease, but something was done which was not in execution of the lease.

With respect to the third, that the plaintiffs hindered the defendant, or that the plaintiffs undermined, we think that those pleas are not sufficient, and that the issues upon those pleas must be entered for the plaintiffs.

Then I come to the question of damages. Now, with respect to the first breach, that the furnaces were not worked, the arbitrator has found contingent damages, amounting to £117; but it appears to us that, although the verdict upon that issue must be for the plaintiffs, the damages will be merely nominal,

for that the plaintiffs are restrained by the clause in the lease from recovering upon the first breach any damages which they seek to obtain upon the second breach, which damages have been paid into court upon that breach, and taken out by the plaintiffs in satisfaction. The clause is this: "There is to be paid and payable the sum of 3s. for every bloom of ironstone, and so in proportion for any greater or less quantity than a bloom, which the said J. A. Addenbrooke shall from time to time raise, or get out of the said lands or mines." So that if more blooms are procured, they are to be paid for. "And, also, that the said J. A. Addenbrooke, his executors, administrators or assigns, shall and will quarterly, and each and every quarter of a year during the continuance of this demise, raise and get from and out of the said mines hereby demised, or intended so to be, if there to be found, not less than 780 blooms of ironstone, and as much more quarterly and annually as the said furnaces and works shall or may use or consume, or otherwise shall and will well and truly pay or cause to be paid to the said Edward Foley and Eliza Maria Foley, his wife, and Mary Whitby, and their heirs and assigns, the sum of £468 by way of rent." So that the rent of £468 is the alternative, not only to getting a quantity which would amount to that rent, but it is the alternative to getting that or any greater amount. It appears to us, therefore, to be very clear that the verdict upon that first breach is to be entered for nominal damages only.

With respect to the third breach, it appears to us that it is hardly necessary to do more than advert to the terms of the covenant upon which this arises. There is a covenant to repair, excepting the iron work, castings, railways, gins, winseys, machines, and movable implements, and materials used in or about the said furnaces, fire engines, iron works, stone pits and premises. And there is a power on the part of the lessors, or those who represent them, on notice given at a certain period before the expiration of the lease, to purchase those articles. It appears that they declined purchasing them, in consequence of which the defendants stopped the works, and removed a very large number of the articles; and the question is, what damages they are to pay in respect of the articles, some of which they had a clear right to remove, others which

they had no right to remove. If the parties find any difficulty in applying the rule, that will be laid down by the court, or if the arbitrator finds any difficulty in applying the rule, the court will give such assistance as may be necessary to enable him to come to a satisfactory settlement. The rule which the court thinks the correct one to act upon is this: that whatever was in the nature of a machine, or part of a machine, as iron work or iron castings, or railways, gins, or movable implements or materials, the defendants had a right to remove; that whatever was in the nature of building or support of buildings, although made of iron, the defendants had not a right to remove; that, with respect to damage to the brick work, which constitutes a considerable portion of the claim made by the plaintiff, the defendants were not bound to restore the brick work in a perfect state, as if the article that it was intended to protect, or support, or cover, were there. It was sufficient for the defendants to exercise their right to remove what the lease gave them authority to remove; and in doing so, to remove the brick work and to leave it in such a state as would be most useful and beneficial to the lessors, or to those who might next take the premises. Now, subject to that rule, perhaps it may be necessary just shortly to mention the items, and dispose of them according to that rule.

The first item is that of boilers, £180; clearly the plaintiffs have no right to retain them, or to seek for damages for removing them. So with respect to the value of the boiler grates, £50, and the value of the castings and iron work of the engine and regulator, £970, and of the spring beams, £14.

The next item is, the damage sustained by the plaintiffs by reason of the removal of the articles, if the court shall be of opinion that the defendants had no right to remove them in the manner described. If that damage means damage to brick work connected with the boiler, the boiler grates and the iron work, and castings of the engine and regulator, we think the plaintiffs have no right to recover that sum.

But, from the language used by the arbitrator, it may be that some part of it is recoverable, because, although, upon the facts stated, we think the defendants had a right to remove them, the statement is coupled further with this, that they

had no right to remove them in the manner described. Now the manner is not described with sufficient accuracy to enable us to come to a distinct conclusion, whether the plaintiffs are entitled to any damages or not. The only rule we can lay down is, that these leasees had a right to remove them, doing as little damage as possible, and leaving the premises in a state fit to be used for a similar purpose by another tenant.

The value of the brick work of the hot-air apparatus is £47. That is subject to just the same remark. It does not appear with sufficient distinctness before us what was the state of the brick work, or how it was left, so as to be the subject of complaint. If the brick work was merely disturbed for the purpose of taking the hot-air apparatus, which the defendant had a right to take, and, being so disturbed, it was left in a condition fit and convenient for the restoration of another hot-air apparatus by another tenant, then we think no damages ought to be recovered.

The next item is the value of the piping, £321; we think the defendants entitled to remove them.

The next is the damage done to the furnaces by removal of the hoops, bearers and brickstuffs, inclusive of the value of the same, £53 13s. 10d.; we think the plaintiffs were clearly entitled to recover that amount, those articles not being iron work in the nature of machines or implements, but being iron work substituted for additional brick work, with a view to give additional and probably necessary strength to the furnace, which the defendants had no right to remove or deteriorate.

The next four items are the value of the cupola, the value of the blast-pipes which worked it, the value of two refineries, and of the blast-pipes which worked them—being £9, £4 16s., £69, and £9 17s. 9d. We think the defendants had a right to remove them.

Then eleven puddling furnaces, £385; four mill-furnaces, £140. Those appear to have been precisely of the same nature with the fire-engines and the other matters of iron used in the course of the work, which the defendants had a right to remove.

Then the next is the value of the boilers of the forge en-

gine, the value of the grates of the boilers, the value of the castings and iron work of the forge engine, the value of the boilers of the mill engine, the value of the grates of the boilers, and the value of the castings and iron work of the mill engine. As to the boilers of the forge engine and the boilers of the mill engine, those, I observe, were already struck out before this paper was handed up to the court. As to those six items, the sums of which are £110, £40, £290, £60, £30, and £151, we are of the opinion that all those the defendants were entitled to remove, under the clauses in the lease.

Then there is the damage sustained by the plaintiffs by the removal of the said engines, £134 4s., which is open to the same remark as that which I have already made with respect to one or two other items—that, if the damage was really the removing the brick work and taking the iron away, leaving the brick work in the most convenient condition for the restoration of similar works for the use of another tenant, then we think no damage ought to be given; if there was anything beyond that, the parties must either settle it among themselves, or, with the assistance of the arbitrator, ascertain what that damage was.

Then there is the value of oak taken from the forge hammer foundation, £7 4s.; that we think the plaintiffs entitled to recover.

Then the damage sustained by the plaintiffs by the removal of the plates from the shears foundation, including the value of the plates and pins, £35 4s. 2d.; we regret to find the value of the plates mixed up with the damages sustained by the removal of them; for the plates themselves, it appears to us, the defendants had a right to remove, and the arbitrator must separate that finding into two parts. The plaintiff will be entitled to recover damages, if any, in respect of the improper removal, but the plates themselves we think the defendants had a right to remove.

Then, with respect to the holding-down pins, and the bed plates, two items of £36 5s., and £64 7s. 3d., we are of the opinion that the defendants were entitled to remove them, and that the plaintiffs are not entitled to any damages on that head.

Then, there is damage done to the brick work, £14; that is

subject to the same remark as that which I have already made.

Then there is the value of the cast iron columns, £14 8s. Those were columns used for the support of the building. With respect to those, we are of opinion that the columns used for the support of the building are not within the exception in the lease, and that the plaintiffs are entitled to recover damages for the removal of them. The value of the gasometer and apparatus, £110, we think the plaintiffs are not entitled to. The brick pillars, and damage done to the tank, £5, is subject again to the same remark. If any unnecessary and wanton damage has been done, and the premises have been left in such a state as not to be conveniently applicable to the same purpose, to that extent the plaintiffs would be entitled to recover damages. The value of the buildings removed, £112 3s., we think the plaintiffs are entitled to recover.

On the general breach of repairs, £280 16s. 8d., of course the plaintiffs are entitled to recover.

The last item is £117, which, for the reasons already given, we think the plaintiffs should not recover, but the damages upon the first breach must be limited to nominal damages.

We think that, with this expression of our opinion, the parties will be able to arrange themselves, or with the assistance of the arbitrator, the precise amounts of damage. The materials before the court are not sufficient to enable us to come to a precise amount. All we can do is to point out how the issues are to be entered, and to lay down such rules as will probably enable the parties to say precisely what are the amounts for which the verdict ought to be entered.

Judgment accordingly.

MARQUIS OF BUTE V. THOMPSON ET AL.

(13 Meeson & Welsby, 487. Court of Exchequer, 1844)

¹ Mine exhausted under covenant to raise fixed annual amount. The *Narr.* alleged that plaintiff let his interest in a coal mine to defendants,

¹ *Smith v. Morris*, 8 M. R. 317.

who covenanted to raise and work 13,000 tons of coal in each year, and pay at the rate of eight pence per ton royalty for the same, or pay that amount of money, to wit, £433 6s. 8d., as fixed rent, whether the coal should be got or not; and also nine pence per ton for all coals beyond the 13,000 tons. *Breach*—that defendants had not raised 13,000 tons in each year and paid at the rate of eight pence per ton for the same, nor the fixed rent. *Plea*—after setting out the indenture on oyer that by the fair and proper working and getting of the coal, the same, before and at the commencement of the said half year, was greatly exhausted; and a small portion thereof only, being less than a fourth part of such 13,000 tons, was left and remaining to be worked and raised. *Held*, on demurrer, that this was an absolute covenant by the defendants that they would raise 13,000 tons of coal yearly; or, if not, that they would pay the fixed rent, and that there was no implied condition that there existed coals to the amount of 13,000 tons yearly capable of being worked. 2. That the breach was well assigned.

COVENANT.—The declaration stated that by an indenture, dated the 24th of March, 1842, made between the plaintiff, of the one part, and the defendants, of the other part, reciting that, by an agreement of the 23d of April, 1824, one Edward Davis agreed to let to the plaintiff all his right and interest in the coals and other minerals (ironstone excepted) in the Pwllly-Wheale estate, in the parish of Merthyr, in the county of Glamorgan, in as ample a manner as the same were demised to Davis. It was witnessed that the plaintiff thereby demised and let to the defendants all his right and interest in the coals and other minerals in, upon and under the said estate, in as ample a manner as the same were demised to him, the plaintiff, by Davis, from the 25th day of March, 1827, for the term of fifty years wanting ten days, yielding and paying yearly, for every ton of coal that should be worked, raised, or got by the defendants in each year, not exceeding in the whole 13,000 tons in any one year, the sum of 8d. per ton, or yielding or paying that amount of money, namely, the sum of £433 6s. 8d. each year, as fixed rent, whether the coal should be worked or not; such royalty or rent to be paid and payable by four equal quarterly payments, that is to say, upon, etc.; that the defendants covenanted that they would raise and work 13,000 tons of coals in each year during the said term, and pay at the rate of 8d. per ton royalty for the same, or pay that amount of money, namely, £433 6s. 8d., each year, as fixed rent, whether the coals should be wrought or not; and also 9d. for each ton

over and above that quantity, to whatsoever extent the same might be wrought. Breach, that the defendants had not raised or worked 13,000 tons of coal in each year during the said term, and paid at the rate of 8*d.* per ton for the same, or paid that amount of money, namely, £433 6*s.* 8*d.* each year as fixed rent, whether the coals were wrought or not, but on the contrary thereof, to wit, on, etc., a large sum of money, to wit, £216 13*s.* 4*d.* of the said rent, for one half year of the said term, became, and was, and still is in arrear and unpaid to the plaintiff.

The defendants in their plea craved oyer of the indenture of lease, and set it out in full. The *reddendum* was as follows:

“Yielding and paying yearly and every year during the said term, unto the said Marquis of Bute, his executors, etc., for every ton of coal that shall be worked, raised or got by the said W. Thompson and T. S. Forman, their executors, etc., in each and every year, not exceeding in the whole 13,000 tons in any one year, the sum of 8*d.* per ton, or yielding and paying that amount of money, namely, the sum of £433, 6*s.* 8*d.*, in each year, as fixed rent, whether the coals shall be worked or not, such royalty or rent to be paid and payable by four equal quarterly payments, etc.; and, further, yielding and paying yearly and every year, during the said term, hereby granted unto the said Marquis of Bute, etc., for every ton of coals that shall be worked, raised or got by the said W. Thompson and T. S. Forman, in each and every year, over and above the quantity of 13,000 tons, the sum of 9*d.* per ton; and also yielding and paying yearly unto the said Marquis of Bute for every ton of stones, sand and fire-clay hereby demised, which shall be worked, raised and actually used, and not otherwise, from or under the said farm and lands, such price as the said marquis shall for the time being charge and receive for every ton of stones, sand or fire-clay belonging to him, the said marquis, and let by him or permitted to be got out of any of his land within the parish of Merthyr, aforesaid, or the neighborhood.”

Then followed a covenant by the defendants that they would raise and work 13,000 tons of coals in each year, and pay at the rate of 8*d.* per ton royalty for the same, or pay

that amount of money, namely, £433 6s. 8d., each year, as fixed rent, whether the coals should be wrought or not, and also 9d. for each ton over and above that quantity, to whatever extent the same might be wrought; and also pay to the said marquis, his executors, etc., for every ton of stones, sand and fire-clay which should, by virtue of those presents, be raised, worked and used by said defendants, etc. The defendants then pleaded, as to the alleged breach of covenant in the declaration relating to the non-payment of half a year's rent, that in and by the fair and proper working, etc., of the said coal, the same became and was, before and at the commencement of the said half year, greatly exhausted, and that before and at the commencement of the said half year, a small and inconsiderable portion thereof only, the same being less than one fourth part of such 13,000 tons, and no more, was left and remained to be worked, etc., under and by virtue of the said indenture; and that the defendants have always worked, raised and got the said coal, with due care, diligence and dispatch, and still continue to do so with all possible and practicable care and dispatch.—VERIFICATION.

DEMURRER AND JOINDER.—The point marked for argument on the part of the plaintiff was, that the covenant was an absolute covenant to pay the money rent, and not a conditional covenant.

The case was argued in the last Trinity term (May 29) by ERLE, for the plaintiff. The main question in this case is, whether the covenant for payment of the fixed rent was conditional on the fact of coals being raised sufficient to pay the sum of £433 6s. 8d. after the rate of 8d. per ton. The defendants contend that, if the colliery be exhausted, so that coals sufficient to make up that amount can not be raised, they are discharged from the payment of the fixed rent. If that view of the case be correct, the declaration would, perhaps, be bad, for not averring that such an amount of coals was raised. But such is not the true construction of the lease. Even if it were a demise of the coals only, with these covenants, and the coal failed altogether, the rent would nevertheless remain due; but at all events that is clearly so here, where it is a demise of other minerals also, which are part of the consideration for the entire rent. The terms of the covenant are express, to pay

£433 6s. 8d. for each year "as fixed rent, whether the coals shall be worked or not." In *Rex v. Parrott*, 5 T. R. 593, the lessee of a coal mine was held to be ratable in respect of it to the relief of the poor, although he worked it at a loss after paying the rent. The court would not inquire whether the tenant had made an unprofitable bargain. In *Rex v. Bedworth*, 8 East, 387, indeed, he was held to be excused from liability to be rated to the poor, where the mine, having become unproductive, had ceased to be worked; but it was assumed that he continued liable on his covenant for the payment of rent. Lord Ellenborough says: "The failure of the coal will not discharge the lessee's covenant to pay rent. Perhaps he may have calculated on that event, and may have received, during the former part of his term, an adequate value from the then produce of the mine to compensate the continuance of the rent to the end of the term." This is in the nature of a sale and purchase of the whole interest in the mines, the purchase money being paid by an annuity for a term of fifty years, and that whether the coals be worked or not. The thing demised has passed to the lessee, and therefore the rent must be paid, although the value of it be gone. But, secondly, this is a demise, also, of all other minerals upon the estate, except ironstone; that interest is in the defendants, and *non constat*, upon this record, that they are not working under the demise, other mines, and raising from them minerals more than sufficient to satisfy this rent.

KELLY, for the defendants.—The words of the *reddendum* in *Rex v. Bedworth* were stronger than here. There the lessee was to pay during the term "the clear yearly rent of £200 at least, and in all events, whatsoever the state of the mines might at any time be and whether any of the coal, etc., should be gotten or not." Here the terms are, "Yielding and paying, yearly and every year, for every ton of coal that shall be worked, raised or got in each and every year, not exceeding in the whole 13,000 tons in any one year, the sum of 8d. per ton, or yielding and paying that amount of money, namely, the sum £433 6s. 8d. each year as fixed rent, whether the coals shall be worked or not." It is a *reddendum* in respect only of the coal worked, raised or got. What is meant is, that the

lessees shall, during the term, work and raise 13,000 tons of coal, at least, per annum, for which they shall pay a royalty at the rate of 8*d.* per ton, and the object is to compel them to work to that extent, for which purpose they are alternately bound to pay the same sum as fixed rent, whether they work or not. It is no more than a covenant that they shall work to the extent of 13,000 tons yearly, and that, whether they do so or not, they shall pay rent on that amount; but the *existence* of coals, to be worked and paid for, is a condition precedent to the attaching of the rent. If the intention of the parties had been as is contended for on the other side, why did they not employ the same words as in *Rees v. Bedworth*, "whatever the state of the mines may be?" The words "whether the coals shall be worked or not," are capable of a reasonable interpretation as laying the lessees under an obligation not to neglect the working of the mines. They are words of *qualification*, not words binding the lessees to an absolute payment of the rent at all events, and are introduced merely as a means of giving effect to the former covenant, that they will raise and work 13,000 tons a year. That covenant imports that there shall be coals to be worked and raised; and so also the *reddendum* is, not for the enjoyment of the land, or the right to dig and take the profits of the mine, but a reservation in respect of the coals worked and raised; and if there be no coals to work or raise, there is no liability to the rent reserved. With respect to the argument that this is a demise also of other minerals, the answer is, that throughout the lease, all the payments are reserved separately in respect of the coals and of the other minerals. As far as this question is concerned, it is a lease of the coals only.

Secondly, the breach is insufficient. The general allegation "that the defendants have not worked or raised 13,000 tons of coal in each year during the term, and paid at the rate of 8*d.* per ton for the same, or paid that amount of money, namely, £433 6*s.* 8*d.* each year as fixed rent," is controlled by the following words: "but on the contrary thereof," and limited thereby to that which follows, and which alone constitutes the breach, viz., that £216 13*s.* 4*d.* "of the said rent" is in arrear: *Harris v. Mantle*, 3 T. R. 307.

There is no breach, therefore, as to the royalty, and conse-

quently, unless in all events a money rent were payable, there is no sufficient breach. It is like the reservation in old leases of a hawk or capon, and a breach that a capon was not rendered. It is not sufficiently stated, being in the alternative.

[POLLOCK, C. B.—The case of *Harris v. Mantle* does not bear you out.

There the breach assigned was that the defendant had not used the farm in a husbandlike manner, but, on the contrary, had committed waste. Here it is expressly stated that the defendants have not done either the one thing or the other—either worked the 13,000 tons or paid the royalty, or paid the rent.]

ERLE, in reply.—The meaning of the parties was clearly this: up to 13,000 tons of the payment shall be 8*d.* per ton; for all above that amount 9*d.*; 13,000 is the probable average; if it falls below that amount the lessees may pay a money rent; but at all events they shall pay for the subject-matter of demise not less than £433 6*s.* 8*d.* It is altogether different from a demise of the surface, because here the subject-matter of the demise is destroyed in the course of working, and it must have been so contemplated by the parties. It is, therefore, in the nature of a sale and purchase of the subject-matter of the demise for the rent.

Cur. adv. vult.

On the sixth of July last the court intimated that their judgment was in favor of the plaintiff; and now POLLOCK, C. B. said:

This case was decided some time ago. We have been asked for the reasons of our judgment, which was that the plaintiff was entitled to recover. The foundation of the opinion of the court is extremely short. This is an action of covenant; the defendants have expressly covenanted that they, their executors, administrators and assigns, or some or one of them, should and would raise and work 13,000 tons of coal in each and every year during the term, and pay at the rate of 8*d.* per ton royalty for the same, or pay in money annually £433 6*s.* 8*d.* each year, as fixed rent, whether coals should be wrought or not, and also 9*d.* upon each ton over and above that quantity, to whatever extent the same might be wrought. We

are of opinion that this stipulation for a fixed rent, coupled with a covenant that coal should be wrought to that extent, and if above it, that there should be a payment of 9*d.* for each ton over and above, does not carry with it, by any implication, a condition that there shall be coals to that amount capable of being wrought. It appears to us to be a stipulation on the part of the defendants that they would work and get that quantity, and that if they did not get it, they would pay a fixed rent to the landlord; and we can import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties they should so have expressed it. This is the short ground on which we are of opinion that the plaintiff, the Marquis of Bute, is entitled to the judgment of the court.

Judgment for the plaintiff.

JOHN B. EMERY AND CYRUS GAULT v. CORNELIUS H.
AND CALEB D. OWINGS, Administrators
of Beale Owings.

(6 Gill, 191. Court of Appeals of Maryland, 1847.)

¹ Devise of quarry and its rents. The owner in fee of land containing a stone quarry, having mortgaged and leased the quarry, devised it to his son with directions "that the rents arising from the quarry be applied to discharge the incumbrances on the same:" *Held*, that the rents due at the date of testator's decease passed to the son as parcel of the devise for the purpose directed, and not to the executors.

Debt and rent out of same subject-matter. The direction to apply the rents to debts arising out of the subject-matter of the devise compels such construction; if the direction had been to pay debts generally it would be otherwise.

The construction of written contracts is not to be submitted to the jury.

Rubble stone not included in lease of the granite. A lease granting the right to quarry granite stone made to parties in the business of stone cutting: *Held*, not to carry the right to take the rubble stone. Granite stone is a well known article of commerce, sold by the cubic foot. Rubble stone is sold in mass or by the perch.

¹ *Owings v. Emery*, 7 Gil', 405.

Rent—Damages—Application of payments. Money paid as rent and received as such under agreement, can not be applied on an account for damages though arising out of the same subject-matter.

No procedendo when recovery impossible. The court will not issue a procedendo upon reversal of judgment, when it is apparent that a set-off which must be allowed will exceed the plaintiffs' claim.

Appeal from Baltimore County Court.

This was an action of debt, brought by the appellees against the appellants, to recover the sum of \$750, debt. The plaintiffs counted upon a lease made by Nicholas Owings, deceased, to the defendants, of a granite quarry in Baltimore county, as owner in fee, dated 11th June, 1840, for the term of six years, from the 10th November following. The lessees were to quarry forty thousand cubic feet in each year, and pay one and one fourth cents for each cubic foot rent, quarterly, and alleged that they entered upon the demised premises; that N. O. on the 7th July, 1841, devised the reversion of the leased premises to Beale Owings, for his natural life; that on the 30th December, 1841, N. O. died seized of the reversion. The declaration then proceeded to show the amount of rent up to the commencement of this action, and the periods at which the same accrued, etc.

The defendants pleaded *nil debet*, with leave to give in evidence any special matter which might be pleaded in bar of the action upon notice, etc.

1st exception. Upon the trial the plaintiffs proved the lease declared upon, for the granite quarries known as the Fox Rock or Fox quarry, with the right of quarrying the same in such quantities from time to time as the lessees' co-partners may have occasion in their business, or may choose, not less than 40 M. cubic feet in each year, during the demised term, yielding and paying to the lessor, etc. It was stipulated in the lease that it should not be construed to impair or affect the right or interest of, etc., under or by virtue of a mortgage theretofore executed by the said lessor, Nicholas Owings.

It was admitted that N. O. was dead, having first duly made and published his last will and testament, containing, amongst others, the following clause:

"It is my will and desire, that the rents arising from the quarry, known by the name of the Fox Rock quarry, be applied to discharge the incumbrances on the same."

It was also in proof that the Fox Rock quarry was a part of the real property which Nicholas Owings devised to his son, Beale Owings, the intestate of the plaintiffs in this action; that Cornelius H. Owings and Francis R. Griffith were appointed executors by the will of Nicholas Owings, and Beale Owings was in possession of the lands and premises devised to him; and that the defendants were in possession of the quarries and demised premises in 1841, 1842 and 1843. Beale Owings died on the 26th July, 1844, intestate, and that letters were granted to the appellees on his estate.

The defendants, after notice to the plaintiffs, and to show that the plaintiffs had no right to any of the rent claimed, which fell due after the 10th August, 1842, proved an assignment of the quarry from B. O. to Edward Green, dated 7th Oct. 1842.

The defendants further gave in evidence by Matthew G. Emery, that he was employed in cutting stone at the Fox Rock quarry, in the year 1840; that in the summer of the year after, Noah Worthington had torn up the railroad running across his land (being a part of the railroad leading from the said quarry to the Baltimore & Ohio Road), and before said railroad, thus torn up, had been laid down again—being on a visit at the house of Nicholas Owings—had a conversation with him respecting the said railroad that had been torn up, and as to the prospect of its being laid down again; that in this conversation N. O. said that he was very sorry it had been torn up, and that he did not know what he should do to get it put down again, as he had no money to pay to Noah Worthington the sum he demanded, that is, \$866, the amount he had expended in law suits about said road, and that he, Nicholas, did not know what he should do, unless Emery & Gault would advance to him that sum; that on his next visit to N. O., he, N. O., said that Emery & Gault had advanced to him the said sum of \$866, to be taken out in rent of said quarry; and that he, N. O., had sent the money over to Mr. Worthington, and that in consequence of said advance, he, the said Nicholas, would not receive any-

thing for two years, as it would take nearly that time to pay off said advance. The said witness, then, upon examination by plaintiffs, proved the following receipt:

"BALTIMORE COUNTY, June 5, 1840.

"Received of Emery & Gault \$866, to be returned them in granite stone, to the amount of sixty-nine thousand three hundred feet, without interest, between the 10th November, 1840, and the 10th November, 1846, they being at the expense of quarrying and transporting the same from my quarry, known as the Fox Rock quarry.

NICHOLAS OWINGS."

The defendants further gave in evidence by Matthew G. Emery, that he was present when Gault, one of the defendants, paid to said N. O. the sum of \$101.85, and that the following receipt was given therefor:

"Rec'd. Balt. County, Feb. 19th, 1841, of Emery & Gault, \$101.85, on account of quarry rent.

"NICHOLAS OWINGS."

The defendants also proved the following receipt:

"Rec'd, Balto., Octo. 13th, 1841, of M. G. Emery, for E. N. Gault, \$20, on account of Nicholas Owings.

"C. H. OWINGS."

That he, the witness, did not pay the sum of \$20 on account of rent due, but on account of rent to become due. It was to go on account of the lease. The plaintiffs gave proof to rebut the parol evidence offered by the defendants, as to the application of the money advanced by them to Nicholas Owings, as an offset to the rent claimed in this action, and that it was paid on a different account.

The plaintiffs further gave in evidence, by Peter Gorman, a competent witness, duly sworn, that he knows the Fox Rock quarry, and knows what is called rubble stone. There is a large amount of that kind of stone, including offal and dirt, at the Fox Rock quarry, that has been accumulating since the quarry was opened; that dimension stone are used in building warehouses and for columns, etc. The dimension stone are the main object in opening a quarry; they are worth from 40 to 50 cents per cubic foot in Baltimore; that rubble stone, if a man wants it, is worth from 50 to 75 cents, perhaps one dollar per perch; that the witness, within five years past, received

from the Fox Rock quarry a few car loads of rubble stone which he used in building a house; that he purchased them of Emery & Gault, who delivered them on cars, near to the house of the witness; that he paid one dollar a car load, each containing about a perch and a half, equal to about thirty-seven cubic feet. There has been a good deal of rubble stone used in constructing the Baltimore & Ohio Railroad. Don't know of any other sale or use by Emery & Gault of rubble stone from the Fox Rock quarry, except what he, the witness, took; that there is at the Fox Rock quarry an immense heap of offal stone and rubbish, three fourths of which is sand, and good for nothing; that forty thousand feet, or \$500 worth, at the rate of one cent and a quarter per foot, might be got out in a year at the Fox Rock quarry. It has always been considered that the expense of getting stone from that quarry was less than at other quarries.

The plaintiffs, further to support the issue on their part, and to rebut the evidence given on the part of the defendants, gave in evidence by William Clary, that he had been a stone cutter for three years; that he considers the Fox Rock quarry more advantageous for furnishing stone to the Baltimore market by several cents in the foot, than other quarries. There is a descent from the quarry to the Baltimore & Ohio Railroad except for the distance of two hundred yards; that he, the witness, never knew any custom, at any of the quarries, to pay for the rubble stone, neither at Worthington, which was worked in 1833, but not since, nor at the Watersville Fox Rock or Meadow Field quarry.

The plaintiffs and defendants offered testimony in relation to the value of dimension and rubble stone; the comparative facility of procuring them at the leased quarry; the facilities for transporting them to market,—which proofs are not deemed material to be published.

The defendants then prayed the direction of the court to the jury:

1. "That under the will of Nicholas Owings the rents of the Fox Rock quarry did not pass to Beale Owings, the plaintiff intestate, and that the plaintiffs are therefore not entitled to recover in this action," which direction the court (PURVIANCE and LE GRAND, A. J.,) refused to give.

2. "That if the jury find from the evidence that the receipt offered in evidence by the plaintiffs, of the 5th June, 1840, was given by N. O. under an agreement that the same should be applied to the payment of rents thereafter to become due from the defendants to said Nicholas Owings from the Fox Rock quarry, under the lease of the 11th June, 1840, and that the sum of \$866 has not been returned to said defendants by the said Nicholas Owings, to those claiming under him, or in any way satisfied, that then they must allow said receipt, or so much thereof as may be now due as an offset to the plaintiffs' demands;" which instruction the court gave as prayed.

The plaintiffs then prayed the following additional instruction to the jury, to wit:

"But if the jury find from the evidence that the defendants are chargeable with the rubble or offal stone taken by them from said Fox Rock quarry, and that they have taken out the amount of said receipt for \$866, in said rubble or offal stone, then the said \$866 is not to be received in bar of this action. Notwithstanding the jury may find that said \$866 was agreed to be applied to extinguish the rents of said quarry," which the court granted.

The defendants excepted to the instruction of the court, as well in refusing to grant the defendants' first prayer aforesaid, as in granting the additional instruction prayed by the plaintiffs.

The verdict and judgment of the court below being in favor of the plaintiffs, the defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, JJ.

By HINKLEY and NELSON, for the appellants, and

By R. J. BRENT, for the appellees.

DORSEY, J., delivered the opinion of this court.

The defendants, by their first prayer, prayed the opinion of the court to the jury: that, under the will of Nicholas Owings, the rents of the Fox Rock quarry did not pass to Beale Owings, the plaintiff intestate, and that the plaintiffs are there-

fore not entitled to recover in this action; which opinion and direction the court refused to give. Whether the county court were right or not in refusing this prayer depends upon the true construction of that part of the testator's will which relates to those rents. After devising to his son, Beale Owings, the Fox Rock quarry, out of which the rents issue, the will proceeds as follows:

"And it is my will and desire that the rents arising from the quarry known by the name of the Fox Rock quarry, be applied to discharge the incumbrances on the same."

This clause of the will, it is insisted, separates the rents from the reversion devised to Beale Owings; and by necessary implication gives them to the executors of the testator. If the application of the rents had been directed to the payment of the debts of the testator, irrespective of the lands out of which the rents issue, it might have been somewhat difficult to repel the implication of a devise of the rents to the executors of the testator, because to the executors only is confided the ascertainment and payment of the debts of the testator. But by this clause in the will the rents are not directed to the payment of debts generally, but to the discharge of the incumbrances on the Fox Rock quarry. To whom, then, could the rents more appropriately be given to effectuate the design of the testator, than to him to whom the reversion was devised? He was as competent to make the application of them, directed by the will, as the executors of the testator, and much more deeply interested in their being faithfully applied. And further, it is not to be presumed to have been the intention of the testator to diminish the means of collecting the rents, and the certainty of their application to the object by him enjoined, which certainly would be the result of the implication contended for. Had the testator, by his will, have separated the rents from the reversion, and given them to his executors, the only means of their recovery would have been by an action of debt; but if suffered to pass to the devisee, according to the legal import of the devise, the rents could be recovered not only by an action of debt, but by distress, which is justly regarded as much the more speedy, certain and efficient remedy for the recovery of rents. Of the rents when collected, the devisee becomes, as it were,

a *quasi* trustee for their faithful application according to the will. So far from its being necessary to imply a devise of the rents to his executors, to effectuate the intent of the testator, there is every reason to presume his intent to have been the reverse of that, which, by such an implication, it is assumed to have been. There is, therefore, no error in the county court's refusing the opinion and direction to the jury, sought by the appellants' first prayer.

The appellants' second prayer was upon the whole evidence. The defendants, by their counsel, prayed the court to instruct the jury that if they find from the evidence that the receipt offered in evidence by the plaintiffs, of the 5th June, 1840, for the sum of \$866, was given by Nicholas Owings, under an agreement that the same should be applied to the payment of the rents thereafter to become due from the defendants to said Nicholas Owings, from the Fox Rock quarry, under the lease of the 11th June, 1840, and the said sum of \$866 has not been returned to said defendants by the said Nicholas Owings, or those claiming under him, or in any way satisfied, that then they must allow said receipt, or so much thereof as may be now due as an offset to the plaintiffs' demand; which instruction the court refused to give to the jury, but gave to them the following instruction, to wit: "But if the jury find from the evidence that the defendants are chargeable with the rubble or offal stone taken by them from said Fox Rock quarry, and that they have taken out the amount of said receipt for \$866 in said rubble or offal stone, then the said \$866 is not to be received in bar of this action, notwithstanding the jury may find that said \$866 was agreed to be applied to extinguish the rents of said quarry."

The testimony in this case being all received without objection, unless it be on the ground assumed in the court's instruction to the jury, it does not appear that any other reason existed for the court's refusal to grant the defendants' second prayer. It becomes our duty, then, to inquire into the legality of the court's instruction as regards the liability of the appellants to pay for rubble stone. This liability the court referred to the decision of the jury; and in this we think the county court erred.

It is a wise and well established rule of law that the true
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construction of written contracts is to be declared by the court, and not submitted to the finding of the jury. In the lease in question before the court, sufficient appears upon its face to show what was its true intent and meaning; what was the intention of the parties in entering into the contract. The lease describes the appellants (the party of the second part) as residents of the city of Baltimore, and partners in the trade and business of quarrying, cutting and selling granite stone and carrying on the same under their copartnership name and firm of Emery & Gault, and transfers to the appellants "the license, right and privilege of quarrying, getting out, working and carrying away granite stone from said quarry or quarries, to the use and benefit of said Emery & Gault or the survivor of them, and the executors, administrators and assigns of such survivor, for the term of six years, they paying for the stone $1\frac{1}{2}$ cent per cubic foot." The very fact of the stone being sold by the cubic foot, in the absence of all other confirmatory parts of the lease, demonstrates that the stone sold and sought to be obtained under the lease were dimension, not rubble stone, the former being always bought and sold by the cubic foot, whilst it is believed, and may be safely asserted, that in Maryland, no instance exists, or ever did exist, of rubble stone being sold by the cubic foot. Such a rule of admeasurement is wholly inapplicable to rubble stone, and is applicable to sales of dimension stone only, which are never sold by that species of measurement, if to be measured, at all; whilst rubble stone is universally sold in the mass, or by the perch. This interpretation of the contract between the parties is strongly corroborated by the fact that the appellants are stone cutters in the city of Baltimore, and consequently use dimension stone only. Had they been stone masons, there would have been some plausibility in the argument that their contract embraced rubble, as well as dimension stone.

The county court did not err in rejecting the first prayer of the defendants below; but there is error in its refusal of the second prayer, and in the instruction which it gave in relation to the rubble stone, and therefore its judgment should be reversed. *But no procedendo should issue;* because there appears to be but three quarters of a year's rent due on the

lease, for which any action could have been sustained by the plaintiffs below, and the set-off, to which the said defendants have shown themselves entitled, far exceeds that amount.

Judgment reversed.

OWINGS ET AL., Executors, v. EMERY ET AL.

(6 Gill. 260. Court of Appeal of Maryland, 1847.)

Facts of the case—Outstanding surface lease. In 1840 Nicholas Owings leased to defendants the Fox Rock quarry for the term of six years, and the lessees went into possession. In 1836, B & C, who then had the right so to do, had leased to D all their estate and interest, being two third parts of *all that lot* within the farm of N. O. called Fox Rock, for the term of five years, which prior lease, before action brought, had come to defendants as to one half. The metes and bounds in both leases were the same. In an action by the executors of Nicholas Owings for the rent due under the lease of 1840, it was *held*:

1. **Surface lease.** That the lease of 1836 was a grant of the superficies of the soil and did not pass a right to the quarry, as it was not opened at the date of that lease.

2. **Surface and mining leases not conflicting.** That the case is not one of conflicting leases; the deed of 1836 being a lease of the surface of the soil; that of 1840, a lease or license to quarry stone.

Open mines. If a man hath land, in part of which there is a mine open and he leases the land, the lessee may dig the mine; as the mine is open and he leases all the land it shall be intended that his interest is as general as his lease.

Waste. Making of new mines is waste unless the lease is of all mines on the land.

"Recently worked." A recital in a lease dated in 1840, that a quarry "had been recently or a short time ago possessed and worked by W.," can not be understood as meaning that the quarry was opened four years previously.

Appeal from Baltimore County Court.

This was an action of debt, brought by the appellants against the appellees, to recover \$500 rent on a lease made

¹ *Raine v. Alderson*, 1 Arn'd, 329; *Moore v. Miller*, 8 Pa. St. 272; *Walker v. Tucker*, 8 M. R. 672.

by Nicholas Owings on the 11th June, 1840, to the appellees, for the term of six years. The lessees were to enter the demised premises on the 11th November, 1840, and the rent claimed was for the first year. The defendants pleaded *nil debet*, with leave to give any special matter in evidence which might be pleaded in bar, upon notice, etc.

1st exception. At the trial the plaintiffs read in evidence the lease, as follows:

"This indenture, made this 11th June, 1840, between Nicholas Owings, of, etc., and John B. Emery and Cyrus Gault, witnesseth, that the said N. O., in consideration of, etc., hath demised, etc., and by, etc., doth demise, etc., unto the said E. & G. the granite quarry and quarries, situate in Baltimore county, near the Patapsco river or falls, on land of said Owings called and known by the name of 'Fox Rock, or Fox Rock Quarry,' being the same which was, or were lately possessed and worked by Wood & Co. and now by Joseph Yager & Co., and which are more particularly described, etc.; and also the leave, license, right and privilege of quarrying, getting out, working, and carrying away, granite stone from said quarry or quarries, to the use and benefit of said E. & G., etc., for the term of six years, from and immediately after the 10th November next ensuing the date hereof, in such quantities, from time to time, as the said E. & G. may have occasion to use in their business, or may choose to quarry—not less than forty thousand cubic feet in each year of the said term—together with, etc., the use of so much, etc., yielding and paying to the said N. O., his, etc., for the use of the premises, and the stone to be quarried and got out of said quarry or quarries, during said term of six years, one cent and one quarter of a cent for each and every cubic foot of stone which shall or may be so quarried and got out therefrom by the said E. & G. They hereby bind themselves to quarry and get out at least forty thousand cubic feet in each and every year during said term, or to pay for that quantity at the rate aforesaid, if they fail to quarry and get out that quantity, and all over to be paid for, etc., and the said N. O. for, etc., doth hereby covenant with the said E. & G. that they, the said E. & G., upon the payment of the said rent or quarry leave, and performance of the

covenants above reserved and mentioned, on their part to be paid and performed, shall and may quietly possess, use, occupy and enjoy the said Fox Rock quarry and premises, included within the following lines, viz.: Commencing at, etc., a stone marked No. 1, and running east to a white oak tree marked with three notches; then northeast to a stone marked No. 2; then north to a stone marked No. 3; then west to a stone marked No. 4, and then to the place of beginning, for the purpose of freely quarrying, getting out, working and carrying away stone therefrom, at their discretion as aforesaid, during," etc.

The plaintiffs further proved that the defendants were in possession of the demised premises during the years 1840 and 1841, etc.; that the plaintiffs were executors of N. O. before the bringing of this suit, and that he died in December, 1841.

The defendants then read in evidence the notice served on plaintiffs' counsel under the leave in this cause, of the matters of defense relied on by them, and a lease dated 25th July, 1836, from Beale Owings and Cornelius H. Owings, who it is admitted had title at said date to make such lease, to Caleb D. Owings, for all their estate and interest—being two thirds parts of and in all that piece or lot of ground within the limits of the farm of Nicholas Owings, being in Baltimore county, which lot of ground is called Fox Rock, and which was granted and conveyed by said Nicholas Owings to the said Beale, Cornelius H. and Caleb D. Owings, by indenture, bearing date on the 20th November last past, and recorded, etc., and which is contained within the description following—that is to say: Beginning for the same at a stone marked No. 1, standing on the outline of a tract of land, called "Wells and Howard's first and second adventure," being a division line between the lands of the said Nicholas Owings and a certain Noah Worthington, and being south of Sweet & Co.'s railroad, and running thence east to a stone marked No. 2; then running north to a stone marked No. 3, planted in an old field, known by the name of Frog's field; then west to said division line, between the lands of the said Nicholas Owings and Noah Worthington, running to a stone marked No. 4, and then south, running with said division line, to

the place of beginning; containing six acres, more or less, to have, etc., the two-thirds of the piece or parcel of ground hereby intended to be demised unto the said C. D. O., his, etc., for the term of five years, accounting from the 25th July, 1836, and thence next ensuing, yielding and paying therefor yearly, and every year during said term, to the said B. O. and C. H. O., etc., the rent or sum of six cents, if demanded, and no more.

The defendants also read in evidence the assignment of said lease, dated the same day, from said Caleb D. Owings to Charles Wood, Joseph Yager, John D. Stewart and Edward Green, and offered to prove by said Yager that said Caleb was a partner with said Wood, Yager and Stewart, but withdrew from said firm about 1839; that on 11th June, 1840, the defendants were the owners of one undivided half part in interest in said lease, dated 25th July, 1836, and said Yager of the other half part; and that the defendants and said Yager remained possessed of said demised premises under and by virtue of said lease of 25th July, 1836, until its expiration in July, 1841. The defendants offered all said evidence for the purpose of showing that the lease now sued on did not take effect until 25th July, 1841.

Whereupon the plaintiffs, by their counsel, objected to said offered evidence, and every part thereof; but the court (PURVIANOE, A. J.), overruled said objection, and admitted the said offered evidence, and every part thereof, to be given to the jury, in reduction of the amount claimed in this action. The plaintiffs excepted.

The other exceptions are sufficiently stated in the opinion of this court.

The verdict and judgment of the county court being against the plaintiffs below, they appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, JJ.

By PARRAN and BRENT for the appellants, and

By HINKLEY and NELSON for the appellees.

MARTIN, J., delivered the opinion of this court.

In this case an action of debt was instituted in Baltimore County Court, by the appellants against the appellees, to recover the sum of \$500, the amount alleged to be due on the 10th November, 1841, for one year's rent of stone quarry called the Fox Rock quarry, which had been demised to the appellees by Nicholas Owings, in an indenture bearing date the 11th June, 1840, for the period of six years, to take effect from the 10th November, 1840.

The defendants pleaded to this action *nil debet*, and under the leave granted to rely upon any defense that could be specially pleaded, gave notice that they would offer in evidence a lease of the 25th July, 1836, for the Fox Rock quarry, made by Beale Owings and Cornelius Owings to Caleb D. Owings, and the assignment of two thirds parts thereof by Caleb D. Owings to Wood & Yager, and which was outstanding, unexpired, and in full force, at the date of the lease on which this action was brought, so that the lease of the 11th June, 1840, could not commence until the lease of the 25th July, 1836, had terminated or expired.

At the trial below, the plaintiffs offered in evidence the lease of the 11th June, 1840, and proved generally that the defendants were in the occupation of the demised premises in 1840 and 1841, and in this posture of the case, and in the absence of all explanatory or defensive testimony, the defendants were to be regarded in legal contemplation, as in the possession and enjoyment of the quarry in question, under the lease of the 11th June, 1840, and were therefore disabled from impugning or controverting the title of their lessor, Nicholas Owings, the appellants' testator.

At this stage of the cause, the defendants, for the purpose of showing that they have been evicted or interrupted in their right of possession as lessees of the Fox Rock quarry, under the lease of the 11th June, 1840, and that they were not responsible for rent prior to the expiration of the lease of the 25th July, 1836, offered in evidence the lease of the 25th July, 1836, in connection with the oral testimony of Yager, who proved that on the 11th June, 1840, the defendants were the owners of the undivided half interest in the lease of the 25th July, 1836, and that the said Yager was the owner of the other half part, and that the defendants and said

Yager remained possessed of the said demised premises under and by virtue of the lease of the 25th July, 1836, until its expiration in July, 1841. The plaintiffs below objected to the admissibility of this evidence, but the objection was overruled and the evidence received. And the testimony offered by the plaintiffs, as exhibited in the second, third and fourth bills of exceptions, having been rejected, upon the application of the defendants, the court instructed the jury that upon the evidence aforesaid the plaintiffs could not recover any rent stipulated to be paid anterior to the 25th July, 1841, because the evidence, if believed by the jury, shows such an interruption of the possession by the defendants under the lease now in suit, as precludes the plaintiffs from recovering any rent anterior to the 25th July, 1841.

The counsel for the plaintiffs excepted to the ruling of the court with respect to the admissibility of the testimony offered by the defendants in the first exception, and to the instruction given by the court to the jury as exhibited in the fifth exception. Both the exceptions raised substantially the same question. The exposition of the law of the case, to be found in the opinion of the court, as expressed in the fifth exception, was predicated upon the evidence introduced under the first exception, and if the court erred in admitting the testimony presented by the plaintiffs in the first exception, their instruction to the jury was necessarily erroneous, as under such circumstances there would be no evidence to sustain it.

It is apparent from the statement we have thus given of the pleadings in this cause, that the claim interposed by the defendants for a reduction and apportionment of the rent can only be maintained upon the ground that a case was presented of conflicting leases, and the point made by the counsel for the plaintiffs on this branch of the argument was, that there was no incompatibility between the lease of the 25th July, 1836, and the lease of the 11th June, 1840, because the first lease operated only as a grant of the superficies or surface of the soil, and did not pass a right to the quarry, which was for the first time demised to the defendants by the lease of the 11th June, 1840.

In *Saunders's* case, reported in 5 Coke's Rep. 22, it was adjudged:

1st. If a man hath land, in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig for it; forasmuch as the mine is open at the time, and he leases all the land, it shall be intended that his interest is as general as his lease is, that is, that he shall take the profit of the land, and, by consequence, of the mine in it.

2d. If the mine were not open, but included in the bowels of the earth at the time of the lease made in such case, by leasing of the land the lessee can not make new mines, for that shall be waste.

3d. If a man hath mines hid within his land, and leases his land and all the mines therein, then the lessee may dig for them, and therewith agrees 9 E. 4, 8, where it is said, that if a man leases his land to another, and in the same there is a mine—which is to be intended of a hidden mine—he can not dig for it; but if he leases his land and all mines on it, then, although the mines be hidden, the lessee may dig for them.

By an examination of the lease of the 25th July, 1836, it will be found that there is no grant of the stone quarry; the expressions in the lease are: All their estate and interest, being two thirds part of and in all that piece or lot of ground within the limits of the farm of Nicholas Owings, being in Baltimore county, which lot of ground is called Fox Rock; and it is perfectly clear that the quarry devised to the defendants by the lease of the 11th June, 1840, was not covered by the lease of the 25th July, 1836, unless the quarry was opened at the date of the lease.

The lease of the 11th June, 1840, contains the following description of the quarry granted by Nicholas Owings to the defendants: "The granite quarry and quarries situated in Baltimore county, near the Patapsco river or falls, on land of said Owings, called and known by the name of Fox Rock or Fox Rock Quarry, being the same which was or were lately possessed and worked by Wood & Co. and now by Yager & Co;" and these expressions were relied on by the counsel for the appellees, as showing that the quarry was open on the 25th July, 1836. But certainly no such deduction can be drawn from the use of these descriptive expressions. When the lessor, on the 11th June, 1840, said, that the quarry

which he was describing had been recently, or a short time ago, possessed and worked by Wood & Co., he can not be understood as meaning that the quarry was opened, and in the occupation of the persons to whom he referred, as long back as the 25th July, 1836, a period of nearly four years.

We have examined the testimony delivered by Yager, for the purpose of ascertaining if there was any fact stated by the witness from which the jury could infer that the quarry in question was open at the date of the lease of 25th July, 1836. But no such fact is supplied by the testimony of this witness. He says that on the 11th June, 1840, the defendants were the owners of one undivided half part in interest in the lease dated the 25th July, 1836, and he, the witness, of the other half part, and that he and the defendants remained possessed of the demised premises under and by virtue of the lease of the 25th July, 1836, until its expiration, in July, 1841; and when the witness speaks of being possessed of the demised premises, we understand him as referring to the lot called the Fox Rock, granted by the lease of the 25th July, 1836; and if he could be regarded as alluding to the quarry demised by the lease upon which this suit is brought, it could not be relied on as indicating that the quarry was open on the 25th July, 1836, as his evidence does not profess to carry the possession of himself and the defendants further back than the 11th June, 1840.

We think that upon the circumstances of the case, as presented by the first bill of exceptions, the lease of the 25th July, 1836, must be treated as granting only the superficies or surface of the soil, and conferred upon the lessee no authority to dig for or work the quarry mentioned in the proceedings, and that there was, therefore, no incompatibility between the rights demised by the first lease, and those granted by the lease of the 11th June, 1840. And this being so, it follows that the defendants, as the lessees of the Fox Rock quarry, could not have been impeded or interrupted in the use and enjoyment of that quarry by the lease of the 25th July, 1836.

The pretension of the defendants that they were entitled to a reduction and apportionment of the rent which had become due on the 11th November, 1841, was not sustained by the

evidence in the cause, and the court below erred in admitting the testimony offered by the appellees to the first exception, and in the instruction which they gave to the jury in the fifth exception.

The testimony offered by the plaintiffs below, in the second, third and fourth bill of exceptions, was proposed to be introduced for the purpose of repelling the evidence which had been produced by the defendants, as exhibited in the first bill of exceptions; and as according to the view we have taken of that evidence, it ought not to have been received by the court, and is to be treated as not in the cause. The questions decided by the county court with respect to the admissibility of the testimony offered by the appellants, have become mere abstract propositions, upon which it is not necessary for this court to express an opinion. Practically, the testimony was properly rejected, for it results from the opinion we have expressed upon this case, that the right of the appellants to recover the sum of \$500, as the amount of rent due to them at the period of the institution of this action, was not affected by the lease of the 25th July, 1836.

The judgment of the county court is reversed on the first and fifth bill of exceptions, and affirmed upon the second, third and fourth bills of exceptions.

Judgment reversed—procedendo awarded.

FISHER V. MILLIKEN.

(8 Pennsylvania State, 111. Supreme Court, 1848.)

¹ **Election of mode of payment of rent, determined.** The lessees of a mine covenanted to pay forty cents a load for the ore taken, but were at liberty to substitute an annual sum, at their election, to be made at the end of the first year; but in case they did not so elect, they covenanted to take out annually, and pay for, 800 loads. No substitution was in fact made at the end of the year: *Held*, that their covenant to pay at the said rate for each load became positive, absolute and indefensible.

² **Assignor of lease bound, notwithstanding subsequent modifications.**

¹ *Foley v. Addenbrooke*, 8 M. R. 349.

² But not liable to keep assignor's contracts with strangers: *Preston v. McCall*, 7 Grat. 121.

The lessee is bound upon the covenants of his lease, to his lessor, after an assignment by the lessee, and is not released by a subsequent contract between the lessor and the assignee modifying the lease in matters not affecting the covenant sued on.

The relation of landlord and tenant as to a covenant for payment of rent can be dissolved only by an agreement between themselves, which equity would enforce.

What will release assignor. Nothing but a surrender, a release or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant with his landlord.

Disinterested witness. The assignee of the lessees of a mine who had paid for as many loads of ore as he was bound to pay for by the contract of assignment, and who does not appear to be responsible to any one—not to the landlord, because he had performed his agreement with him, and not to the lessees, because he was bound to perform no covenant but his own—is disinterested, and therefore a competent witness.

In error to the Court of Common Pleas of Mifflin County.

May 18th, Isaac Fisher brought an action of debt against Joseph Milliken and George McCulloch, who survived William Mitchell, upon an article of agreement, or sealed instrument of writing, dated 17th of September, 1829.

It appeared that Isaac Fisher, the plaintiff, held the sole and exclusive right forever, in a tract of 500 acres of land, situated in Oliver township, Mifflin county, and near to Waynesburg, of mining in and taking away all the iron ore to be found in the said tract of land, in carts, wagons, etc., with the further right of cutting timber on the said tract of land, for the purpose of working the mines in the most effectual manner. No question arose as to the title of Isaac Fisher, the plaintiff, to the land, or as to his right of mining it, or assigning his right to others.

On the trial in the court below, before BURNSIDE, P. J., the article of agreement or sealed instrument of writing upon which this action was brought, was given in evidence. This article of agreement, dated the 17th of September, 1829, was between Isaac Fisher and Joseph Milliken, George McCulloch and William Mitchell, since deceased, and executed and delivered by said parties. The material parts of the article were the following:

“That the said Milliken, McCulloch and Mitchell being the owners of Hope Furnace, with the appurtenances, in Der-

ry and Wayne townships, and Fisher being the owner of a mine or bank of iron ore, near Waynesburg, which he purchased from Benjamin Walters, by deed bearing date the 25th day of September, 1827, conveying to Fisher all the ore in a certain tract of land therein described, containing 500 acres, more or less, and which said Walters formerly purchased from Thomas Burnside, Esq., adjoining lands of Samuel Holliday, George Galbreath's heirs and others. For the consideration hereinafter contained, Fisher grants to the said Milliken, McCulloch and Mitchell, and to their heirs and assigns, the right and privilege from this date forever, to enter in, over and upon the said tract of land and every part thereof, and to dig in, open and mine on any part of said tract of land, haul, take and carry away therefrom so much of the iron ore therein to be found as may be sufficient to supply the said Hope Furnace or any other furnace which they, the said Milliken, Mitchell and McCulloch may at any time build and erect on Strode's Run north of the Lewistown and Huntingdon Turnpike; but no more ore is to be taken than will be sufficient for one furnace, and that furnace to be located on the run aforesaid, north of said turnpike. It is understood and agreed that on the 1st of June, 1831, or at any time before that, the said Milliken, McCulloch and Mitchell, their heirs or assigns, may and are to have the privilege of laying off, by lines and corners, any place they may think proper on the said tract of land, an acre and a half of ground (in the shape hereinafter described) on, in and over which they shall have the exclusive right of digging, mining and carrying away the ore therefrom, the said Fisher, his heirs and assigns, only reserving the right of passing over and through the said acre and a half of ground, by a road or cut of twenty feet in width, and of sufficient depth for carts and wagons. The said Fisher, his heirs and assigns, to have the ore found in opening such road or cut, unless the said Milliken, McCulloch and Mitchell, their heirs and assigns, choose to dig or open such road or cut at their own costs, in which case they shall be entitled to take or carry away all the ore found in opening or digging the same. The said acre and a half, when so laid off, is to belong exclusively to the said Milliken, McCulloch and Mitchell, so long as they shall continue to use the ore therefrom at the Furnace of Hope

or any other furnace located as aforesaid; and in the event of there being a sufficient quantity of ore contained in the said acre and a half to be selected by the said Milliken, McCulloch and Mitchell, they are to be confined, in raising, digging and carrying away ore, to the said acre and a half. But if the ore shall at any time fail in the said acre and a half, or prove insufficient to supply one furnace, the said Milliken, Mitchell and McCulloch, their heirs and assigns, to have the right to dig for, raise and carry away ore from any other part of the tract of land aforesaid, not interfering with any pits or mines which the said Fisher, his heirs or assigns, may open or be using.

"It is agreed, on the part of the said Fisher, that he, his heirs or assigns, will not enter upon said tract of land, to dig or take away ore, before the 1st day of June, 1831, and from that time the said Fisher, his heirs and assigns, to be at full liberty, which is hereby expressly reserved, to dig, take and carry away, at any and all times, as much ore as they deem proper for the said land, except from the acre and a half conveyed to the said Milliken, McCulloch and Mitchell; Fisher at the same time agreeing and binding himself that he will never assign the right of taking away ore to be used in any furnace in which the said Fisher is not personally interested or in part owner (save only the grant or assignment to the said Milliken, McCulloch and Mitchell, herein contained). This covenant to run with the mine or bank forever.

"The said acre and a half of ground to be laid off by Milliken, Mitchell and McCulloch by lines parallel to, and at right angles with the course of the ridge which lies northwest of the mine, the acre and a half to be laid out in a square.

"In consideration of the premises the said Milliken, McCulloch and Mitchell, their heirs and assigns, covenant to pay to the said Isaac Fisher, his heirs and assigns, for and during the first year, to be computed from the time they shall commence to haul ore from the mine aforesaid, at the rate of forty cents per wagon load of two tons unburnt for all the ore they shall haul away from the mine. At the expiration of the first year it shall be optional with the said Milliken, McCulloch and Mitchell to pay at the same rate per load, or pay Fisher \$250 per annum and \$100 to B. Walters, which

Fisher has covenanted to pay him for each year he or his heirs or assigns may use the said ore bank. If Milliken, McCulloch and Mitchell should raise Hope Furnace to a greater height, then the sum to be paid Fisher annually—if they choose to pay by the year—shall be \$350, and the \$100 to Walters as aforesaid. If they should at any time build a new furnace on said run of eight feet, and shall choose to pay by the year, then the annual sum to be paid Fisher—if they choose to pay by the year—shall be \$500 and the \$100 to Walters as aforesaid, and the sum to be paid Fisher, including the \$100 to Walters, to be increased at the rate of \$100 over and above \$500 for every foot in the size of said furnace over and above eight feet in the boshes. It is further agreed, that after the first year, if the said Milliken, Mitchell and McCulloch shall choose to pay by the load, they shall take and pay for at least 800 loads.”

It appeared that the defendants under this agreement dug some ore, but never hauled any away. They some time afterward sold Hope Furnace to David W. Huling, and put him in possession in 1830. Huling dug and hauled ore under the agreement between Fisher and the defendant for a number of years. On the 6th day of August, 1830, Isaac Fisher, without consulting the defendants, so far as the evidence showed, entered into the following agreement with David W. Huling:

“It is agreed between Isaac Fisher and David W. Huling as follows: Fisher is the owner of an ore bank in Wayne township, by contract with Benjamin Walters, and Mr. Huling is owner of Hope Furnace, with the appurtenances, by purchase from Mitchell, Milliken and McCulloch.

“Now it is agreed between David W. Huling and Isaac Fisher that the agreement formerly entered into with Mitchell, Milliken and McCulloch is to be modified as follows: David W. Huling, having succeeded to all the rights of the latter, David W. Huling agrees to relieve and exempt Fisher from the payment of all and every sum and sums of money or metal to Benjamin Walters, on account of the ore to be used at Hope Furnace; and instead of the prices settled in the former agreement between Mitchell, Milliken and McCulloch, to which this is declared a supplement, David W. Huling is to pay Fisher, his heirs, etc., twenty-five cents per load yearly

on the 1st day of April, and is to have the right of taking 400 loads in each year, to make the payments to Walters, for which Fisher is not to receive anything; David W. Huling to pay or satisfy all claims of Walters, whether founded on, contract with Fisher or Mitchell, Milliken & Co.; the right of the parties to remain respectively as secured by the former agreement of September 17, 1829, except as above excepted, and except also that the following stipulation in the former agreement of September 17, 1829, is abrogated and repealed, to wit: 'Fisher at the same time agreeing and binding himself that he will never assign the right of taking away ore to be used in any furnace in which he, the said Fisher, is not personally interested, or in part owner (save only the grant to Milliken, McCulloch and Mitchell herein contained); this covenant to run with the mine or bank forever,' it being now agreed that Fisher and his assigns are to be exempt and forever discharged and released from this covenant. Witness our hands and seals, August 6, 1830."

David W. Huling, who was examined as a witness, under objection by the plaintiff on the ground of interest, testified that Milliken, McCulloch and Mitchell never blowed Hope Furnace; that he went into possession of said furnace in 1830; that he got his ore principally from the Walters bank and the Keiser bank; that all the ore he got from the Walters bank was under the written contract with Fisher, and which was read to the jury by him; that he had to pay Walters \$100 yearly, which Fisher was to pay; that to pay that sum it took 400 loads of ore yearly, and that he never took more than 400 loads yearly from the Walters bank, and that he consequently had nothing to pay to Fisher; that he had also an agreement with Walters that if he took no ore he was to pay no rent; that Fisher was with him, and he thought made this agreement with him simultaneously, or immediately after he purchased Hope Furnace from Milliken, McCulloch and Mitchell. His evidence was objected to by the plaintiff, and a bill of exception sealed by the court. The witness further testified as follows:

"I can't tell whether before or after I made the purchase from Milliken & Co. I made the agreement with Fisher; but it was well understood if I made the purchase of Hope Fur-

nace I could get the ore from Fisher and Walters. Mitchell, Milliken and McCulloch had raised some ore. I paid them for that. There was none hauled until I hauled it. They had raised some, and I paid for the raising of it.

Cross-examination.—"I purchased out Milliken, McCulloch and Mitchell with the appurtenances. It was in writing. I took possession of Hope Furnace under the agreement with them, but not of the ore bank. I got that under an agreement with Fisher and Walters, 23d October, 1844. Served it yesterday." Notice read to produce agreement with Huling for Hope Furnace.

Joseph Milliken sworn: "I know nothing of that agreement. I don't think there was an agreement. Mitche'll drew the writing. I have no recollection I ever had it."

David W. Huling further cross-examined by plaintiff: "The defendants had hands coaling at the mines when I purchased. I estimated the expense of raising the ore, and paid for that. I continued raising there all the summer. I think I got possession in 1831. I do not know that I laid off the acre square. I claimed it, and if I laid it off, it was under. I think I had no hands working there before my agreement with Fisher. I did not come under their agreement to take ore. I claimed, I suppose, to dig ore under their agreement and mine with Fisher and Walters, but I was not going to dig ore under their agreement. I went into the matter about 1830, all about the same time. I never hauled any ore to any other place than Hope Furnace, nor ever hauled from that bank to any other place."

This snit was brought to November Term, 1840, and the plaintiff alleged that he was entitled to the price of 800 tons of ore yearly from 1831 up to the time of bringing snit.

It appeared from the charge of the court (BURNSIDE, P. J.), that the plaintiff's counsel contended that the first article was in force, and would so remain forever; and that the defendants were bound to pay under the said article, either \$350 a year, or to pay for 800 tons of ore yearly, as the jury found the fact, which had accrued after the date of the article, and before this action was instituted.

The following were plaintiff's points, and the answers of the court to the same:

"The plaintiff asks us to instruct you:

"1. Under the legal construction of the article of September 17, 1829, the easement or right of digging and taking away ore from the mine was appurtenant to Hope Furnace. We answer that the owners of Hope Furnace might have made it appurtenant to Hope Furnace under their agreement with Mr. Fisher.

"2. That the use of the ore could not be separated from the furnace without the consent of Isaac Fisher. We agree the grant of the ore by Isaac Fisher was only for Hope Furnace and such other furnaces as might be built on Strode's run, north of the turnpike.

"3. That David W. Huling, Esq., in virtue of his purchase of the furnace, succeeded to the rights of using the ore at the furnace in the same manner that Milliken & Co. had it before their sale of the furnace to Huling; but there is no evidence before the court and jury what were the terms of their sale; and Mr. Huling, on the cross-examination of the plaintiff, discloses that he did not dig ore under the purchase from Milliken & Co., but under his agreement with Fisher and Walters, and that he was not going to dig ore under the plaintiff's agreement with the defendants.

"4. That Mr. Huling, by virtue of this purchase of the furnace, and entering upon the easement of the ore bank, became liable to pay Fisher the yearly sums which Milliken & Co. had contracted to pay. This would be true if Mr. Huling had entered on the ore under a purchase from Milliken & Co., and worked the ore bank without any subsequent agreement with Isaac Fisher.

"5. That Fisher had a right to enter into the article of the 6th August, 1830, for his further security, and that the said article did not operate as a release of Milliken & Co. from their contract with Mr. Fisher.

"6. That there is nothing in the article of the 6th August, 1830, obligatory upon Joseph Milliken or McCulloch or Mitchell, and that none of the stipulations in the said article would prejudice the defendants.

"7. There is no evidence before the jury of any act done by Isaac Fisher which in law or equity releases or discharges the defendants from the covenant to pay the plaintiff as stipulated in the article.

"8. That under the article of the 17th of September, 1829, the plaintiff is entitled to recover from the defendants the sum of \$320 per year, with interest yearly, computing the time from the expiration of one year after the time the defendants, or any one holding the title to Hope Furnace, began to haul ore from the mine.

"10. That under the article of the 6th of August, 1830, the only benefit that the defendant can claim is to reduce the annual payment to \$200 yearly, according to the price mentioned in that paper; the yearly payments to bear interest from the time they fell due.

"The points Nos. 5, 6, 7, 8 and 10 relate to the same subject-matter, and will be answered together. We agree Mr. Fisher had a right to enter into the article of the 6th August, 1830, if he thought proper to do so; but we can not instruct that that article did not operate as a release of Milliken & Co. from the contract with Fisher. The jury will bear in mind that Milliken & Co. never blew Hope Furnace—never hauled a pound of ore from the Walters bank. They had dug some. Huling bought Hope Furnace, and then Huling and Fisher agree, under their hands and seals, that Huling is the owner of Hope Furnace, with the appurtenances, by purchase from Milliken, Mitchell and McCulloch. Now it is agreed between them, Huling and Fisher, that the agreement of Fisher with Milliken, Mitchell and McCulloch is to be modified, and they go on and change the former agreement into material points. Huling made an agreement with Fisher. He went into possession and dug the ore and paid for it. If these facts are true, and we do not see how their truth can be disputed, we think the agreement superseded his agreement with the defendants, and that the defendants may take advantage of it, and they are discharged by the act of Mr. Fisher from paying for the ore dug by Huling. You will bear in mind that this article between Fisher and Huling was entered into before the defendants were bound to make an election whether they would pay by the year or load. How could they elect after this agreement between Fisher and Huling? If Fisher put Huling in possession, as Huling swears, was it not an ouster of the defendants? and if he ousted the defendants why should he support this action against them? In the judgment of the

court the plaintiff by his own act has destroyed his right of recovery against the defendants.

"We are further asked to instruct you—9: That under the pleadings in the action the defendants admit the cause of action set forth in the plaintiff's declaration, and the plaintiff is entitled to recover unless the defendants have shown that they have paid the plaintiff.

"The pleas are covenants performed, and payment with leave, etc. In Pennsylvania the plea of payment with leave does not admit any material averment in the declaration or statement, excepting the execution of the instrument upon which the action is brought, and except what is admitted by the general issue in every action: *Roop v. Brubacker*, 1 R. 304, which plea admits the contract as set out; but if the suit is for damages for the non-performance of that contract, the damages must be proved; the mere averment by the plaintiff, without evidence of the amount, will not authorize a finding of more than nominal damages, unless when the amount was part of the agreement."

To this charge and the answers of the court to the points submitted, the plaintiff excepted. The jury found a verdict for the defendants; whereupon the plaintiff sued out this writ of error.

The admission of Huling as a witness, and evidence given by him as embraced in plaintiff's first and second bills of exception, and the answers of the court to plaintiff's points, were the errors assigned.

FISHER and PARKER, for plaintiff in error.

R. C. & J. T. HALE, *contra*.

GIBSON, C. J.

The article of agreement between the plaintiff and the defendants was in substance the lease of a mine, and had all the consequences and qualities of one. It was to be perpetual, or at least so long as the lessees should continue to use the ore for the furnace specified in the deed; and they covenanted to pay forty cents the load for it, but they were to be at liberty

to substitute an annual sum at their election, to be made at the end of the first year; and they further covenanted that if they should not so elect, they would annually take out and pay for 800 loads. They in fact made no substitution, and their covenant to take and pay for the number of loads, and the price specified, became positive, absolute and indefeasible. Thus bound, they sold their furnace, with the appurtenances, to Mr. Huling, who entered on the mine, but agreed with the plaintiff to modify some of the terms of the lease. The plaintiff was bound to pay an annuity of \$100 to the person from whom he bought the mine, the payment of which had been assumed by the defendants, but was now assumed by Mr. Huling, who was to be at liberty to take 400 loads, at the rate of twenty-five cents each, to meet the charge, and at the same rate for whatever else should be taken by him. In every other point and particular the covenants and stipulations in the lease were to remain intact.

On the principles of the action, and those resulting from the relation of landlord and tenant, a doubt is entertained whether something less than a release might not absolve the defendants from the obligation of their covenant. It is a doubt, however, which I myself do not entertain; and without having the authority of the court for it, I am free to say that nothing but a surrender, a release or an eviction can, in whole or in part, have that effect. It will not be pretended that any arrangement or dealing of the lessor with a stranger would have it at law; and it is clear that equity will not relieve the lessee from his positive covenant for any act of the lessor which does him no injury. As he can not be prejudiced by the landlord's relation with a third person, there is every reason in the world why he should not have an advantage from it. The relation of landlord and tenant as to a covenant for payment of the rent can be dissolved only by an agreement between themselves, which equity would enforce; but there was neither such agreement here, nor a consideration for one, nor was there privity between them as regards the arrangement with Mr. Huling. In conformity to this principle, it has been held in an almost countless number of cases collected in *Comyn on Landlord and Tenant*, 275, that the tenant is bound by a covenant to pay the rent, though he

assign his lease with the landlord's assent, and though the latter accept the assignee for his tenant, and receive rent from him. My own opinion is, that this principle covers and disposes of the whole case. For the same reason equity refuses to relieve against such a covenant, though the premises be consumed by fire, destroyed by the elements or eneroached on by the sea. It is true that in *Camden v. Morton*, and *Brown v. Quilter*, 2 Eden's Rep. 219, in which it appeared that the landlord was insured, and, the premises having been consumed, had received the insurance money, a court of equity enjoined him from proceeding on the covenant till he should rebuild, and left the tenant his option to surrender his lease in case he should refuse to do so. But in *Hare v. Groves*, Anstr. 687, in which Chief Baron McDONALD said there "might be some equity to say that he should not keep the house or its value and receive the rent also, and in *Holtzapffel v. Baker*, 18 Ves. 115, in which it was observed at the bar that it was difficult to conceive how the distinct contract of the lessor with the insurance office, with which the lessee had no concern, could affect the right between them, chancery refused to interfere. It is just as difficult to conceive how the distinct contract of the plaintiff with Mr. Huling, which did not prejudice the defendants, and with which they had no concern, could release them from their covenant. From the two cases last quoted, the conclusion of Mr. Chitty—and it is eminently entitled to respect—is, that the two preceding ones are overruled.

But not to insist on the peremptory nature of the covenant, a majority of the court concur that the modification of the lease by the agreement with Mr. Huling did not disturb the engagement to take and pay for, at the original price, the number of loads originally specified. With Huling, so far as he was concerned, the plaintiff agreed that the price should be twenty-five cents the load, but Huling did not bind himself to take any particular number of loads. He stipulated for liberty to take 400, or barely enough for payment of the annuity which he took upon himself; so that if the covenants of the defendants were discharged, the plaintiff might get nothing more for his mine. But the covenant in the lease to pay for 800 loads was expressly reserved, and on every principle the

defendants are bound by it. But how far? It follows not that because the plaintiff might choose to let Mr. Huling have all the ore he should take at a reduced price, he would be bound to let the defendants off at the same price for loads not taken at all. The contract with Huling extended only to loads taken, not to what should not be taken; and in prejudice of the landlord's absolute security, it is not to be extended by implication. Had Mr. Huling agreed to raise the price, the defendants would not have been bound by it, and it is impossible to conceive how they could avail themselves of the agreement to lower it. They were not parties to it, nor, as regards it, in privity with those that were. The objection that the two contracts are inconsistent with each other, and that the plaintiff might recover a double satisfaction by an action on each of them, presents but the shadow of a difficulty. It never has been conceived that payment of rent by an assignee is not *pro tanto* payment by the assignor. Payment, even by a stranger, will discharge a debt, and it has not been supposed when the landlord accepts the assignee of a covenantor who becomes liable only on privity of estate, that he has two rents instead of two securities for the same rent. When there is no covenant, express or implied, by the lessee to pay, and debt is brought on the *reddendum* in the deed, he has not even that; for it appears by *Wadham v. Marlowe*, 8 East, 314, that where there is barely a reservation, without a covenant to pay, the lessee is discharged by an assignment, because there is then no privity, either of contract or estate, between the original parties, and the assignee becomes liable on privity of estate only. There is really therefore, no difficulty in the case before us. The plaintiff is entitled to recover the value of 800 loads a year at the original price, but not the amount of the annuity paid by Mr. Huling. The objection to the competency of the latter as a witness, is not sustained. He paid for as many loads as he was bound to do, so far as we know, by the contract of assignment, and does not appear to be responsible to any one; not to the plaintiff, because he performed his agreement with him, and not to the defendants, because he was bound to perform no covenant but his own. He was therefore disinterested.

Judgment reversed, and venire de novo awarded.

BELL, J., dissented, and BURNSIDE, J., took no part, having ruled the cause below.

HARGRAVE ET AL. V. KING ET AL.

(5 Iredell, Eq. 430. Supreme Court of North Carolina, 1848.)

¹ **Covenant against assignment—Subletting.** A condition in a lease for years, or for life, that the lease is to be void if the lessee assigns, is valid. But a lessee under such a condition may associate others with himself in the enjoyment of the term, or may make a sublease.

² **Agent taking lease in his own name.** If one agree by parol to buy land for another, and he does buy the land, and pays for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement, and compel him to make title to the principal; so of an agreement to procure a lease for another. In these instances the Statute of Frauds does not apply.

This was an appeal from an interlocutory order of the court of equity of Davidson county, overruling the pleas of the defendants, at spring term, 1848, his Honor, Judge PEARSON, presiding.

The bill alleges that the plaintiffs and the defendants, Adderton and King, agreed to associate themselves together as a company or copartnership, for the purpose of procuring a lease from the defendant, Sawyer, of certain land owned by him, and to search and operate for gold thereon; that in pursuance of this agreement, King procured a lease from Sawyer of seventy-five acres of land for the term of twenty years; that the lease was taken "to King and those he may associate with him;" that after King had obtained the lease, the plaintiffs and the defendant Adderton, in pursuance of their previous agreement, requested King to sign with them written articles of agreement by which their interest in the said lease should be recognized and secured, and by which the parties respectively were to contribute equally toward the expense of working the mine, and to divide the net profits equally;

¹ *Burdon v. Barkus*, 4 De Gex, F. & J. 42; *Post PARTNER; Briles v. Pace*, 13 Ired. L. 279.

² *Collins v. Case*, 1 M. R. 91.

that King, under one pretext and another, from time to time refused to enter into any written agreement, and finally set up claim in himself to the whole lease. The prayer is, that King may be declared a trustee of the lease for the plaintiffs and himself and the defendant Adderton, and may be decreed a trustee to convey to them, as his associates, and for other relief.

The defendant King filed two pleas: "The plea of Roswell A. King, one of the defendants, to the bill of complaint of Samuel Hargrave, James A. Long and Samuel Gaither, exhibited against said King, Enoch Sawyer, and Jeremiah Adderton in this honorable court.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's said bill of complaint to be true, in such sort, manner and form as the same are thereby set forth and declared, which for plea thereunto saith:

That the lease mentioned in the bill, and this defendant is required to produce for the inspection of this honorable court, is the same of which a copy is hereunto appended, marked (A), and the original of which is ready to be produced, if required by this honorable court, and defendant prays that the said copy may be taken as a part of this his plea.

That by the terms of the said lease it will appear that this defendant can not associate with himself any persons without the consent of the lessor, one Enoch Sawyer, or sell or transfer any part or interest in the said lease without such consent, on pain of a forfeiture of the entire lease by this defendant; and this defendant doth aver that the said Sawyer, on application by this defendant, hath refused his consent to the complainants as lessees or associates of this defendant in the said lease, and hath informed this defendant that he shall insist on the condition in the said lease by which such association or transfer or sale to others, with his consent, is declared a forfeiture, and shall proceed to enforce the same should such sale, association or transfer be attempted; all which matters this defendant doth aver and plead in *bar* of the complainants' said bill and pretended demands.

And this defendant, for further plea, saith: that he is advised that by the act of the General Assembly of this State,

passed in the year 1819, Rev. Stat., Ch. 50, Sec. 8. 'all contracts to convey lands or any interest in or concerning them, shall be void and of no effect, unless such contract or some note or memorandum thereof shall be put in writing, excepting leases for three years.' And also by the act of the General Assembly, passed in the year 1844, 'all contracts for leasing or leases of lands for the purpose of digging for gold or other minerals, or for the purpose of mining generally, shall be void and of no effect, unless such contract or lease, or some memorandum or note thereof, shall be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.' And this defendant saith: that neither he nor any other person by him lawfully authorized, did ever sign any contract or agreement in writing to sell or lease, or for the sale of or the leasing of, any lands *to the complainants*, or any lease for digging for gold or minerals generally, or any lands, or any interest in or concerning any such lands for any such purpose or to any such effect, or any note or memorandum in writing of any such agreement, nor has any one signed any such deed, lease, or agreement, or any such note or memorandum thereof, by authority of this defendant."

(Copy of the lease filed, omitting the details.)

This indenture, made the 22d day of January, 1848, between Enoch Sawyer, of the county of Randolph and State of North Carolina, of the one part, and Roswell A. King and *those whom he may associate with him* for the purposes therein contained, of the other part, witnesseth, that the said Sawyer, for and in consideration of the sum of one dollar to him in hand paid, etc., and in further consideration of the covenants hereinafter contained, hath demised, granted and leased, and these presents doth demise, grant, etc., unto the said Roswell A. King and his associates, a certain tract or parcel of land lying, etc., containing 75 acres, more or less, *to have and to hold the said land, to him the said King and his associates, their executors, administrators and assigns*, together with all and singular the privileges for the complete assignment of the same for mining purposes, that is to say, from the date of these presents until the 22d day of January, 1868, that is, twenty years; and the said King doth covenant and promise

to commence operations on or before the 10th day of February next, and to pay to the said Sawyer one seventh of all the gold, silver and other metal which may be extracted or obtained from the said mine, which toll of one seventh shall be paid monthly to the said Sawyer, his heirs or assigns; also my mill site, etc., etc.

The said King has not the privilege of the timber without permission. The said King not to sell or transfer this lease under forfeiture of the same, without consulting said Sawyer.

(Signed and sealed.)

ROSWELL A. KING. [SEAL.]

ENOCH SAWYER. [SEAL.]

The plaintiffs set the pleas down for argument, and it was considered by the court that the said pleas be overruled, with costs, and that the defendant King answer the bill; from which interlocutory decree the defendant King prayed leave to appeal to the Supreme Court, which was allowed.

MENDENHALL and W. H. HAYWOOD, for the plaintiffs.

WINSTON, WADDELL and J. H. BRYAN, for the defendants.

PEARSON, J.

The appeal only brings up the interlocutory decree overruling the pleas. Our consideration, therefore, is confined to their sufficiency.

Many objections were taken in this court for the want of form. It may be that the pleas are defective in form; but as we concur with the opinion below upon the substance, we express no opinion as to the formal objections.

The first plea was objected to because the allegation, "that the defendant can not, by the terms of the lease, *associate* with himself any persons, or sell or transfer any part or interest in the lease without the consent of the lessor, on pain of a forfeiture," is repugnant to and inconsistent with the terms of the lease, which is made a part of the plea. This objection would be fatal, but to raise the questions which were intended to be presented by this plea, we will consider the allegation made so as to conform to the words and terms of the lease.

Two questions are there made: Is a condition valid, by which a lease for years is to be void, if the lessee assigns? Such a condition is clearly good in a term for years or for life. It is not a capricious exercise of power on the part of the lessor. In a lease for agricultural purposes, the lessor is interested in having a good tenant and one who understands his business. He is more so in a lease for mining purposes, where greater skill is required and more confidence is necessarily reposed in accounting for the tolls or rent.

The other question is: Will King, by the terms of this lease, incur a forfeiture, by recognizing the plaintiffs and the defendant, Adderton, as his *associates*, and conveying to them as tenants in common *with himself*?

Clearly he will not. Conditions are taken strictly because they divest estates; hence, although there be a condition not to assign, the lessee may make a *sublease*; *a fortiori* he may take in associates or partners. The lease under consideration has an express clause by which King is allowed to associate others with himself. The condition is, "that he is not to sell or transfer the lease," in other words, he is not to "assign," so as to be *himself* no longer interested in it. The plea is founded upon an entire misconception of the lease and the condition. The object of the lessor was to provide that King should retain an interest in the lease, because he had reliance upon his skill and honesty.

It was not intended to cramp his operations by excluding the aid of associates.

The second plea was objected to, because the averment that "neither the defendant nor any other person by him authorized, did ever sign any contract or agreement in writing to sell or lease, or for the sale of or leasing of any lands to the *complainants*, or any lease for digging for gold, or minerals generally, or any lands, or any interest in or concerning any such lands," etc., is irrelevant to, and does not meet any allegation made in the bill; for the bill does not allege that the defendant did agree to sell or lease any land, or any interest in or concerning land to the plaintiffs, but the allegation is that the defendant leased the land of Sawyer (which lease is in writing) for himself and as the agent of the plaintiffs and the defendant, Adderton.

This objection is fatal; it goes to the merits. The plea does not allege that the *agreement* set out in the bill was not reduced to writing, so as to raise the question whether that *agreement* comes within the operation of the statutes which are referred to in the plea. So the plea does not "*hit the case*" made in the bill, and is, therefore, no answer to it.

But if the plea had been so framed as to raise the question whether the *agreement* set up in the bill comes within the objection of the statutes referred to, we think it does not.

The effect of the act of 1844 is to except contracts "for leasing or leases" (when the purpose is to dig for gold, etc.) out of the exception in the act of 1819, allowing parol contracts for leases not exceeding three years. In regard to leases, both statutes are, by their terms, confined to cases where one makes a lease, or agrees to make a lease, to another.

It is well settled that if one agrees, by parol, to buy land for another, and he does buy the land, and pay for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement, hold him to be a trustee, and compel him to make title to the principal; for the statute which requires all contracts "to sell or convey land" to be in writing, has no application. The principle is the same when one, by parol, agrees to procure a lease for himself and others, and does procure the lease in his own name; he is a trustee for those for whom he agreed to act, and the statutes referred to have no application.

The interlocutory decree appealed from must be affirmed with costs.

Ordered to be certified accordingly.

PER CURIAM.

RIDGWAY V. SNEYD.

(1 Kay, 627. High Court of Chancery, 1854.)

¹ **Minimum rent exacted from exhausted mine.** Coal mines were demised at a certain royalty per ton upon the coal which might be got, and also at the rent of £300 a year, or so much thereof as with the royalty should amount to that sum, such rent of £300 to be a minimum rent for the coal demised; and the lessee covenanted to pay the rents, and to work the mine: *Held*, that a court of equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working; but that, if the lessor were to sue upon the lessee's covenant to work the mine, the court would interfere.

² **Fault—Caveat emptor.** In applying the rule of caveat emptor to the case of leases of coal mines, it must be remembered that every one acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults.

Mine exhausted before lease. If all the coal had been gotten by ancient workings, that might be a case for equitable relief.

John Ridgway, the plaintiff in this cause, being the lessee and occupier, under different land owners, of adjoining mines and collieries, took from the defendant a lease for twenty years by an indenture dated the 25th of December, 1848, and made between the defendant of the one part and the plaintiff of the other part, of all the mines, veins, beds or strata of coal, cannel and slack, then opened or known, or which should at any time during the continuance of the said demise be found lying under the closes of land therein described, part of which belonged to the defendant, and part had been sold by the defendant to Richard Braddeley, reserving to the defendant the coal under them and power to get the same; and the defendant also demised to the plaintiff in like manner certain surface land, yielding and paying to the defendant for the whole of the coal and cannel thereby demised, which the plaintiff should get during the continuance of the demise, the rent and royalty thereafter mentioned, that is to say, the sum of 1s. for every 2,520 lbs. weight of such coal or cannel, and so in proportion for a less quantity than 2,520 lbs. And also

¹ *Bute v. Thompson*, 8 M. R. 370.

² *Lehigh Co. v. Harlan*, 8 M. R. 423; *Morris v. Smith*, 6 M. R. 22.

yielding and paying to the defendant for the whole of the slack thereby demised which the said plaintiff should get during the continuance of the demise (except such part of the said slack as therein particularly mentioned), the rent and royalty thereafter mentioned, that is to say, the sum of 6*d.* for every 2,520 lbs. weight of such slack; and so in proportion for a less quantity than 2,520 lbs. And also yielding and paying yearly and every year during the continuance of the said demise unto the said defendant for the coal, cannel and slack thereby demised, the rent or sum of £300, or such part thereof as with the several rents, royalties, and sums of money thereinbefore reserved would amount to that sum; and yielding and paying £4 per acre for the surface land demised; all such rents and royalties to be paid half-yearly upon the usual quarter days in June and December. And it was thereby provided and declared that the said yearly rent or sum of £300 thereinbefore reserved, was so reserved as and for a minimum rent for the said coal, cannel and slack thereby demised, in each and every year during the continuance of the said demise; and that, subject to the proviso thereafter contained, anything there contained should not in anywise prejudice or affect the right of the said defendant to have or receive the whole of the several other rents, royalties and sums of money thereinbefore reserved in respect of such coal, cannel and slack in each and every year during the continuance of the said demise, in which the same should exceed the sum of £300. And the lease contained clauses usual in mining leases dividing the whole term into periods, at the end of which, if the rent and royalty thereby reserved in respect of the said coal, cannel, and slack (exclusive of the said annual rent of £300, and the surface rent of £4 per acre), should exceed in the aggregate £300 per year, and if in any year of such period the several rents, royalties and sums of money, exclusive of the said annual rent of £300, and the said rent of £4 per acre, should not amount to the sum of £300 then the plaintiff should be entitled to deduct from the excess of the aggregate amount of such rents, royalties, and sums of money for such five years, above the sum of £300 a year, any sum which he might have paid to the defendant in any year or years of such period, to make up the rents,

royalties, and sums of money thereinbefore reserved in respect of the said coal, cannel or slack to the sum of £300 in each of said years.

And it was thereby also provided and declared, that the mines of coal, cannel and slack thereby demised should (subject as hereinafter mentioned) be worked and gotten in the same progressive and regular course as the mines of coal, cannel and slack of the plaintiff in and under the land adjoining thereto. And the plaintiff covenanted for the due payment of the said rents and royalties, and that the plaintiff and his agents, servants, workmen and miners would from time to time, and at all times during the continuance of the said demise, work, raise and get the mines thereby demised in and under the said lands of the said defendant, and also, subject as hereinafter mentioned, the mines in and under the lands of the said Richard Baddeley, continuously, uninterruptedly and in proper and workmanlike manner, and in the same progressive and regular course as the mines of coal, cannel and slack of the plaintiff in the said lands adjoining thereto should be gotten, obtained and raised, and clear the said mines thereby demised in and under the lands of the said Richard Baddeley in the best way, as was usual in mines and works of the like description. And that if at any time during the continuance of the said demise the mines of coal, cannel and slack, or any of them, in and under the lands of the said Richard Baddeley, or any part or parts thereof, could not, by reason of the damage which would be occasioned thereby to any erections on the said lands of the said Richard Baddeley, or to any mill to be thereafter erected thereon, or any part or parts thereof, or from any other cause whatsoever (except any cause arising from the act or omission of the said plaintiff or his agents, servants or workmen), be worked, obtained, gotten and raised with profit and advantage to the said plaintiff, then and in such case the said plaintiff should not be called upon or required to work, obtain, get or raise any such part of the said last mentioned mines. And in case of disagreement, the fact of the said plaintiff being able or unable to work, obtain, get and raise the said mines, or any of them, in and under the said lands of the said Richard Baddeley, or any part thereof, with profit and advantage for the reasons aforesaid, should be

ascertained by reference to arbitration, as thereafter mentioned. And the said indenture contained powers of entry and distress in case all or any of the rents, royalties or reservations thereinbefore reserved, or the sum or sums of money thereinbefore made payable, should happen to be unpaid for the space of fourteen days next after any of the said half-yearly days or times thereinbefore appointed for the payment thereof. And a proviso for re-entry upon the said mines and lands in the events therein mentioned. And the usual provisions for arbitration, in case, during the continuance of the said demise or after the expiration thereof, any variance, controversy, doubt, dispute or question should arise between the said parties thereto touching or relating to the said indenture or any clause, covenant, proviso, matter or thing therein contained, or the construction of the same, or touching or concerning the practicability of the getting of any part of the thereby demised mines, according to the usual course of mining operations, or in any respect relating to the thereby demised mines and premises.

The plaintiff had discontinued the working of the mines, and the defendant had brought an action against him for the minimum rent of £300.

The plaintiff filed this bill, praying for an injunction to restrain the defendant from all further proceedings in the action commenced by him against the plaintiff, and from commencing or prosecuting any other action or proceeding against the plaintiff upon any or either of the covenants contained in the said lease, and for an account of the quantity of coals, cannel and slack, by the said lease capable of being raised at the date thereof from the said mines, allowing necessary pillars to support the works, and for fire engines, the plaintiff offering to pay to the defendant the sum of one shilling in respect of every 2,520 pounds weight of such coal and cannel, and the sum of sixpence in respect of every 2,520 pounds weight of such slack, on being allowed what he had already paid to the defendant since the date of the lease.

And, if necessary, that it might be ascertained what quantity of the defendant's land the plaintiff had used and occupied in the exercise of the powers and privileges granted by the said lease, the plaintiff offering to pay to the defendant

after the rate of £4 per statute acre for what should be found to have been used and employed by him.

And that, upon making such payments as aforesaid, the defendant might be directed to release and discharge the plaintiff from the covenants and agreements contained in the said lease, the plaintiff offering to execute a surrender of such lease to the defendant, or as he should direct.

The case was argued upon the assumption that the mines were so much interrupted by faults that, although there was coal, it could not be worked with any profit

Mr. DANIEL, Q. C., Mr. W. M. JAMES, Q. C., and Mr. W. RUDALL, for the plaintiff.—This lease has been granted under a mistake common to both parties, namely, the supposition that there was workable coal under this land; and a court of equity will relieve against the consequences of a contract so entered into, especially in a case like a lease of mines, where the lessee had no power of ascertaining what was under the land before taking the lease: *Lowndes v. Lane*, 2 Cox, 363; *Bingham v. Bingham*, 1 Ves., sen., 126. The existence of coal was a condition of this lease, and if there be none which can be got the lease can not be supported: *Smith v. Marra-ble*, 11 M. & W. 5. Courts of equity have interfered in such a case to restrain actions against the lessee for not working: *Smith v. Morris*, 2 Bro. C. C. 311. In *Phillips v. Jones*, 9 Sim. 519, a rent was reserved to be paid whether any coal should or should not be raised, and the working having been discontinued, the court in that case refused to restrain an action for the rent; but that authority may be questioned, not being consistent with *Smith v. Morris*. They cited, also, *Sutton v. Temple*, 7 Jur. 1065; *Rex v. Bedworth*, 8 East, 387.

(VICE-CHANCELLOR.—There may be some ground of equity if the defendant is bringing an action on the plaintiff's covenant to continue the working of the mine.)

Mr. ROLT, Q. C., and Mr. HISLOP CLARKE, for the defendant.—The defendant has not commenced any such proceeding, nor has he any intention of doing so. He only seeks to recover the £300 rent.

Vice-Chancellor SIR W. PAGE WOOD.

I can not restrain the defendant from suing for the rent. Upon the other part of the case—this is not an agreement but a perfected contract, on which no case for relief has yet arisen. I can not distinguish this case from *Phillips v. Jones*. It is said that it is difficult to reconcile that authority with *Smith v. Morris*. The principle of the latter decision is sufficiently plain. There was a lease of mines, and the lessee was to pay, every year he should work, for 1,000 weys, 9s. 6d. each. He covenanted, according to the report, that he would “diligently, at his own costs, try for veins of coal and use his utmost skill to come at the same, and get into working thereof within three years by such pits, engines, etc., as were usual; and would, within one month after he had sunk such pits, constantly (unless hindered by unavoidable accidents) work and raise 900 weys of coals yearly, if so much good merchantable coal might be had out of the same; and, in case so much coal can not be had (without working the pillars necessary for supporting the work), would pay to the defendant, etc., 9s. 6d. for every wey of coals which he, etc., should neglect to raise, and which should be deficient of such quantity of 900 weys, the money for the deficiency to be paid at the end of every year; and, if he should neglect to sink a pit within three years, he should pay the defendant 9s. 6d. per wey yearly for 900 weys, until he should have sunk such pit. And there was a proviso in the deed, that, in case with using due diligence there should not be found a sufficient quantity of coal to work 900 weys a year, or if the lessee during the term should have worked all the coal except the necessary pillars for supporting the work, from thenceforth the lessee should be discharged from the covenant.”

It is stated in the report, that “the defendant brought an action, and assigned seven breaches besides that from not working the mine, which were all given up at the trial; but upon that for not working, although the plaintiff proved unavoidable accidents, the jury gave a verdict for the defendant, and assessed the damages at £427 10s., which were paid. He afterward, in Hilary Term, 1784, brought another action and recovered a verdict on the same breach, with £534 7s. 6d. damages.”

Afterward, two other actions were brought, and the defendant threatened to bring similar actions every year. Under those circumstances, the lessees filed the bill, "charging that, under the circumstances, they were not compellable to work the mines, and that even if they had worked it the mine would, before the filing of the bill, have been exhausted, except working the pillars; therefore, that it is contrary to justice that the defendant should avail himself of the accidents which had happened, but that, upon the defendant being paid for so many coals as could be got, he ought not to require any further payment under the lease. The bill, therefore, prayed an account of the quantity of coals capable of being raised, allowing the necessary pillars to support the works and for a fire engine; and, in case it should appear that the defendant had received a sum equal to the rent payable by virtue of the lease for the same, that he should be restrained by injunction from bringing or prosecuting actions for the rent; or, if it should appear that he had not been fully paid, then, upon payment of so much as he should be unpaid, he should be restrained in like manner."

The court did not affect to vary the contract, or to say that because it was a lease of mines, in consequence of their turning out to be not worth working, the defendant was not to have any benefit from the lease. But what the court said was: If persons are enforcing a contract "for the purposes of harass and vexation, courts of equity properly interfere. The plaintiff calls upon the court to interfere; because, if he carries the contract into execution, he must pursue the object at a greater expense than he can gain by it; the property either being not attainable, or attainable only at an intolerable expense. Admitting it to be attainable in this way, the offer to pay Morris all he could ever obtain without incurring expense, is offering everything he could fairly require."

That is to say, if the lessor can get everything which he contracted for, the court will take care that the lessee shall not, in addition, be put to useless expense, which will benefit no one. That case was not decided upon any ground of mistake. No doubt there is authority, that, where there is an obvious mistake, this court will not interfere to enforce the contract; but it is a different question how far the court

will interfere to prevent due effect being given to an executed contract, where there is no mistake. In this case the alleged mistake is, that both parties thought the subject of the lease was a mine of workable coal; and it turns out that although there is coal, it is not workable.

With regard to mines, the rule of *caveat emptor* must be put rather higher than the plaintiff has here contended for. It has been said, how can a man know what coal there is underground? But every man who has anything to do with mining knows that coal mines are liable to faults. If it had turned out that in the course of working the plaintiff had come across ancient mines, excavated by the Romans or others in former times, and found that there the vein of coal was wholly exhausted, what might in such case have been the result may be a question. But it is well known that it is the course of nature that all mines are liable to faults; and every one who takes a lease of coal mines, though he does so with the firm belief that the veins of coal go on underneath the land, yet knows that they may possibly be interrupted in this way.

Treat the case as if it were a sale of a mine which proved afterward to be full of faults. Of course the purchase would be made for the purpose of working. The coal is not worked out; but nature has done what the purchaser knew beforehand it often does, namely, caused an interruption of the vein of coal. That is one of the incidents which must be calculated upon in buying mining property, and therefore can not be a reason for avoiding the purchase. Looking at this lease, and the mode in which the rent is thereby reserved, the case seems to differ materially from *Smith v. Morris*. The lessor has reserved two specific rents—one in respect of all the coal worked at so much per ton, and another rent of a certain sum every year for the coal demised, which is equivalent to a rent, whether the coal shall be worked or not, as in *Phillips v. Jones*. How am I, therefore, to say that this rent ought not now to be paid? This case seems to me to be completely within that decision. The only difference is, that the lessor has here demised the mine with a clause, providing that there shall be a deduction out of the fixed rent of the amount of royalty which may have been paid for the coal actually

worked, while in *Phillips v. Jones* the royalty was to be added to the fixed rent. That case having been decided by a court of co-ordinate jurisdiction, it is open to me to reconsider the decision. But I quite agree with the learned judge who decided it, that there was a material difference between that case and *Smith v. Morris*. The vice-chancellor says that *Smith v. Morris* "proceeded on this, namely, that by the terms of the lease, the lessee was bound to work the mine, and in respect of the produce, a certain royalty was to be paid to the lessor; and it was said that the circumstances of the mine were such that the lessee would be ruined if he were compelled to work it, and therefore it was just that he should be relieved from the covenant to work the mine, if he gave the landlord all that he could have been entitled to if the mine had been worked according to the covenant—that is, a royalty of 9s. 6d. for every wey of coals contained in the land; but this lease is constructed in a different manner. In the first instance, there was to be paid yearly, during the term of twenty-one years, a gross sum of £300 whether the coal was worked or not, and a royalty of 10s. per wey was to be paid if more was raised than 600 weys; and there was a covenant in the lease which bound the lessee to work the mines. Then came a proviso enabling the lessee, on giving notice, to determine the lease when all the coal should be worked out; and consequently, when all the coal should be exhausted, the tenant might, by giving the required notice, free himself from all the obligations of the lease. If an action had been brought on the covenant to compel the plaintiff to continue the working of the mines, and there had been no other reservation in the lease than a royalty of a certain sum per wey on all the coal raised, then the court would have applied the principle of *Smith v. Morris*, and would have relieved the plaintiff from the expense of working an unprofitable mine on his paying the defendant for all the coal under the land, which would, in substance, be giving him all that he was entitled to under the lease, for he could derive no benefit from compelling the plaintiff to continue the working of the mine."

In this case the lessor can recover £300 a year, whether the coal be worked or not, and the royalty if the coal be worked.

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If the lessor were suing the plaintiff upon his covenant to continue the working of the mine, that would be like the case of *Smith v. Morris*, but no attempt has been made to enforce that covenant. The plaintiff is under legal liabilities by this lease, which the lessor is not seeking to enforce inequitably, and, therefore, this bill is in that respect premature, and must be dismissed with costs.

¹THE LEHIGH COAL AND NAVIGATION CO. v. HARLAN & HENDERSON.

(27 Pennsylvania State, 429. Supreme Court, 1856.)

Partial merger of successive leases of underlying coal veins. A company, the owner of four veins of coal known as the P, Q, R and S veins, let the R vein in 1842, the lessee to take out 8,000 tons per annum. In 1846 they let the P vein to the assignee of the former lease on the same terms, the *minimum* being raised to 15,000 tons. In 1847 the same owners leased to H. & H., who had become the holders of the former leases, the R and S veins, which latter had never been opened—the lessees to take at least 50,000 tons [from the four lodes. The lessors agreed to pay for certain work in faults (they being first consulted and approving by their consent in writing), out of the rent “hereinbefore agreed to be paid.” After the lessees had expended large sums the R vein yielded but a trifling amount of coal, and the S vein none at all. In covenant brought by the lessee upon the lessor’s agreement to pay for the work done in the faults, it was *held*:

1. That there was no merger of the former leases except for the purpose of fixing the aggregate rent.

2. That the covenant to pay for work done in faults out of the rent of the “said veins” must be confined to rents accruing out of the R and S veins only, and this failing it could not be charged to the lessors personally.

² **Verbal modification of covenant.** A verbal assent by the lessor’s agent to the doing of work contracted for by writing under seal, if effectual, operates not to make a new covenant, but to make the lessor liable in assumpsit upon the parol waiver, and the lessor can not be held in covenant in an action based on such waiver; *otherwise* if it had been a suit by the lessor where the lessee had waived a *condition precedent*.

¹ S. C., 8 M. R. 496.

² *Hazleton Co. v. Buck Mt. Co.*, 2 M. R. 389.

Idem. Where a plaintiff sues on a covenant which has been modified by parol in a point essential to the defendant's liability, the written contract will be treated as abandoned or used only to mark the terms and extent of the new stipulations.

Local peculiarities of the action of covenant. The action of covenant, though sometimes in Pennsylvania made to answer the purpose of a bill in equity, is, so far as regards the instrument sued on, strictly an action at law, and if a plaintiff in pleading brings down his covenant to parol to suit his evidence, he defeats his action.

Parol concessions not admissible in "covenant." Evidence of the work done in the faults of the veins was not admissible under the lease where the written consent of the company to its performance had not been obtained.

Error to the Common Pleas of Carbon County.

This was an action of covenant, brought by Ezekiel W. Harlan and Robert Henderson against the Lehigh Coal and Navigation Company, upon the following agreement under seal:

This indenture, made the 12th day of April, in the year of our Lord 1847, between the Lehigh Coal and Navigation Company, of the first part, and Ezekiel W. Harlan and Robert Henderson, of the second part, witnesseth that the said party of the first part, for and in consideration of the payment of the rent and performance of the covenants and agreements hereinafter mentioned on the part of the said party of the second part hereto to be paid, performed, observed and kept, have let and demised, and hereby do let and demise unto the said party of the second part the right and privilege to mine and take away stone coal from the veins known as the R and S veins, and any other veins intermediate between said veins and the Q vein in the Sharp Mountain, on the land of the said party of the first part, near to the town of Tamaqua, in the county of Schuylkill and the State of Pennsylvania; to have and to hold the rights and privileges hereby demised unto the said party of the second part, from and after the 1st day of April, 1847, for and during the term of three years thence next ensuing, fully to be complete and ended on the 31st day of March, A. D. 1850, yielding and paying therefor unto the said party of the first part, their successors and assigns, the rent or sum of twenty-five cents per ton for each and every ton (of 2,240 pounds) during the said term so mined and taken away, of the size that would, in the ordinary course of screening, pass through an

inch square mesh, and over a three eighths inch square mesh, and commonly called chestnut coal; and for all coal of a larger size than the above, 50 cents per ton (of 2,240 lbs.), making a deduction on the whole of said rent of 5 per cent., as is hereinafter provided.

And it is further covenanted and agreed by and between the said parties, that the said party of the second part shall mine and take away from the said veins, and from the P and Q veins now in possession of the said party, at least 50,000 tons of coal in each and every year during the continuance of this lease, provided the said veins, by all proper management, means, efforts, and exertions, can be made to yield or produce the said quantity of coal above specified; said party of the second part shall use all necessary and proper diligence and precautions that may be required to enable them to mine and take away the quantity aforesaid, by running gangways and chutes, day and night, in such manner as may be directed by the mine agent of said party of the first part. But if the said party of the second part shall not use, in the opinion of said agent, the necessary means, efforts and exertions in working the said veins, and shall in consequence thereof fail to mine and take away the said quantity, they shall notwithstanding pay to said party of the first part the same amount of rent as if they had mined and taken away the full quantity of 50,000 tons, as above specified. All the rent that may accrue by virtue of these presents shall be paid by the said party of the second part to the said party of the first part, their successors and assigns, in quarterly payments, on the first day of the months of July, October, January and April.

And it is further mutually covenanted and agreed by and between the said parties, in manner following, that is to say:

That the said party of the second part shall and will, at the expiration of every quarter during this lease, furnish to said party of the first part a statement, signed by themselves, of the number of tons of coal mined during the then next preceding quarter, and the weight of such coal shall be ascertained, fixed and determined by the railroad scales near Tamaqua, attested by the superintendent of said scales; for all of which the said party of the second part shall pay quarterly the rent hereinbefore stipulated to be paid, less the deduction of five per cent.,

as aforesaid, unto the said party of the first part, their successors and assigns; and on failure to pay the rent accruing under this lease, as the same shall become due, according to the terms and conditions hereof, in manner aforesaid, it shall and may be lawful for the said party of the first part, their successors and assigns, to enter on the said demised premises, and to distrain the goods and chattels then and there found, and to proceed with and sell the same according to the usual course of distress for recovering rents in arrear.

2. That all the coal the said party of the second part may mine as aforesaid, shall be screened and prepared in the best possible manner, and be at all times subject to the inspection and approval of the mine agent of the said party of the first part. And should said agent at any time or times decide that the coal is not properly prepared, it shall not be permitted to go to market till properly selected.

3. That all the refuse coal or dirt taken out of said veins, shall be deposited in such position or places as the said mine agent may from time to time direct.

4. That said party of the second part will, at their own expense, and subject to the direction and approval of the superintendent and engineer of the said party of the first part, make all the necessary improvements for opening and working the said veins, by driving a slope from a point to be selected by said superintendent and engineer, into the R and P vein, at this latter point driving a tunnel across into the S vein and bringing the coal from both veins by said slope to the head of the inclined plane now in use for the Q vein and thence transferring it to the breakers and screens now in use for the coal from said Q vein; the said party of the second part also providing, at their own expense, all the additional machinery required for breaking and screening said coal. The said improvements to be completed on or before the first day of April, 1848.

5. That the veins shall be worked in the manner directed by the said company's mine agent, and all the coal shall be taken out as clean as shall be consistent with safety, and the gangways left in good working order at the expiration of this lease, and the mine agent, or the superintendent, of the said party of the first part, shall have the right at all times of

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free ingress and egress to and from said vein, to see that the terms, conditions and stipulations of this agreement are faithfully observed and performed.

6. That the said party of the first part, their successors or assigns, shall have the right and privilege to keep at the expiration, or sooner determination of this lease, all the machinery hereinbefore stipulated to be provided by the said party of the second part, said machinery to be taken at a fair and just valuation to be made thereof.

7. That the said party of the second part shall and will, at their own cost, lay railroads in the drifts and gangways of said veins, and keep the same in good order and repair, and also shall and will furnish all the rails—to be of white oak or yellow pine—the drifts, cars, prop timber, boards, planks, and slabs necessary and requisite for the said railroads, gangways and drifts, subject to the like approval of the mine agent or superintendent of the said party of the first part, but nothing herein contained shall be construed as authorizing said party of the second part to cut or carry away any timber from land belonging to the said party of the first part.

8. That the said party of the second part shall and will, at their own expense, keep the roads, chutes, engines, screens, breakers, and all other machinery, in good working order during the continuance of this lease, and at the expiration or sooner determination thereof, shall and will surrender the said demised premises and all their right and claim to such roads, machinery and other improvements as may be constructed or used for properly working the said veins, excepting the additional machinery for breaking and screening, as is hereinbefore excepted, unto and for the use and benefit of said party of the first part, their successors and assigns.

9. That on failure to pay the said rent in manner aforesaid, or if the said veins shall remain unworked for the space of thirty days at any one time, or if the said party of the second part shall transfer or assign this lease or underlet the premises, without the consent of the said party of the first part first had in writing, or if the said party of the second part shall, in the opinion of the agent of the party of the first part, neglect, refuse, or be unable on their part to comply with or perform any of the said covenants herein set forth,

then, and in either of such cases, this lease and every matter and thing therein contained may, at the option of the said party of the first part, their successors or assigns, become void, and then, and in that case, the said party of the first part may re-enter on the said demised premises, and hold the same as if these presents had not been executed, without prejudicing or affecting any claim they may have for rent, or for damages they may sustain for breach, by the party of the second part, of the covenants above specified, anything hereinbefore contained to the contrary thereof notwithstanding.

10. That if the said party of the second part can not procure, without cost, the right of way through lands owned by others than the party of the first part, then, and in that case, the said party of the second part shall, for the purpose of securing such right of way, institute the proceeding and observe in all respects the formalities required by the act of Assembly of the 5th of May, 1832, entitled "An act regulating lateral railroads," and the cost of such proceeding shall be borne by the said party of the first part. And upon the payment of said cost of proceeding and of all outlays consequent thereon for the obtainment of said right of way, the said party of the second part engage to convey to the said party of the first part, by good and sufficient deeds and clear of all incumbrance, the lands not now belonging to the said party of the first part, which it may be necessary to occupy with said improvements, and which may be acquired with or by amicable arrangement with the owners thereof, or by proceeding under the above mentioned act of 5th of May, 1832.

11. That whenever a dirt fault shall occur in said veins the said company shall and will allow the said party of the second part a fair and just price for running the gangways through all such dirt faults, exceeding ten yards lineal, provided, however, that soft workable coal shall not be considered faults. And in case the rock or slate closes in so as to cut off the coal and render it necessary to cut away the rock or slate in order to obtain the necessary width of gangway, then and in such case the said party of the first part shall and will pay the whole expense of removing such rock or slate faults, they, the said party of the first part, at all times being first consulted, and approving by their assent in writing, of running such gangway in or through any faults.

12. That the said party of the first part will make a fair allowance for the railroad iron and for the spikes necessary for laying the railroads in the main drifts or gangways upon completion of the same, said allowance to be made by deducting it from the rent hereinbefore stipulated to be paid; but no allowance will be made for repairs. And a fair allowance to be determined by the mine agent of the party of the first part, shall also be made for running the slope and doing the other work necessary for opening the said veins, provided the mode of opening the said veins shall have been upon a plan approved of by the engineer of the said party of the first part, the said allowance to be made by deducting it from the rent hereinbefore agreed to be paid.

13. The said party of the second part hereby agree that the mine agent of the party of the first part shall at all times have free access to their mining books and accounts for the purpose of verifying the returns made of the quantities of coal which may be taken from the several veins hereinbefore mentioned.

And for the just and true performance and observance of their respective covenants and agreements aforesaid, the said parties do mutually bind themselves, their respective heirs, executors, administrators and successors, each unto the other, firmly by these presents.

In witness whereof the said party of the first part have caused their common or corporate seal to be hereto affixed, and the said party of the second part have hereto set their hands and seals the day and year first above written.

The facts of the case and the points raised, are fully stated in the opinion of Mr. Justice WOODWARD.

MALLERY, A. E. BROWN and M. GOEPP for plaintiff in error.

GERHARD and REEDER, for defendant in error.

The opinion of the court was delivered by WOODWARD, J.

This is an action of covenant on a mining lease. One of the grounds assumed by the plaintiffs below (now de-

endants in error) was that the owner of reputed coal lands who leases them to a tenant as such and induces him to make large expenditures in opening and preparing to work the veins is liable in covenant to the tenant if the veins turn out to be worthless; that the law implies a covenant of warranty on the part of the lessor, that the veins will be found to be worth working and sufficient at least to reimburse the expenditures of the tenant. The first two counts of the *narr.* and many of the points submitted on the part of the plaintiffs are founded on this proposition, but as the court below ruled it against the plaintiffs, and they have taken no writ of error, it is not up for review, and we allude to it only for the purpose of saying that it is not to be considered as ruled by anything we may say on the other parts of the case.

To develop clearly the questions which are to be ruled a brief sketch of this controversy must first be given.

The Lehigh Coal and Navigation Company, owning lands in the Sharp Mountain, near Tamaqua, which contained, or were supposed to contain, several distinct veins of coal, entered into a lease on the 11th March, 1842, with Denniston, Bowman & Co., for one of said veins, known as the Q vein. The lessees covenanted to make, at their own expense, all the necessary improvements for opening and working said vein, which were to be furnished by the 1st April, 1843, and their advances for which were to be reimbursed out of the first rents that should become due from them for coal taken under the said lease. The term was for seven years from 1st April, 1842, and they were to mine at least 8,000 tons of coal in each year, for which they were to pay for large or broken coal and for egg coal, 35 cents per ton, for pea coal 10 cents per ton.

The memoranda subsequently attached to this lease related to details which need not be noticed here, except that the term was extended to 1st April, 1850.

On the 29th June, 1846, the company made another lease to some of the same individuals under the name of John Anderson & Co., of another vein called the P vein, for the same term and upon the same rent that they held the Q vein. They were to drive at their own expense a tunnel from the Q to the P vein, and were to mine from the two veins not less than 15,000 tons per annum. On the 27th January, 1847, the lessees

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assigned both these leases to the defendants in error, Harlan & Henderson, who went into possession of these two veins.

On the 12th April, 1847, the company entered into a lease with Harlan & Henderson, which is the instrument declared on and which leased to them for the term of three years from 1st April, 1847, "the right and privilege to mine and take away stone coal from the veins known as the R and S veins and any other veins intermediate between said veins and the Q vein in the Sharp Mountain," yielding and paying therefor 25 cents per ton for chestnut coal, and 50 cents per ton for all coal of a larger size, subject to a deduction on the whole of said rent of 5 per cent.

Thus by virtue of three several leases, the plaintiffs below became tenants of four distinct coal veins of the navigation company.

They commenced mining in the two first named veins in February, 1847, and after the third lease they pushed the rock tunnel from the Q to the R vein, which they reached in March, 1848. They found this vein 25 feet thick, but all in dirt fault, and after driving the gangway 415 feet in it without getting through the fault, they abandoned the vein early in December, 1848. They extended the rock tunnel on toward S until they reached what they supposed was that vein, about a foot thick of shelly faulty coal, not fit for use. According to Mr. Patterson, the company's agent, the plaintiffs never reached the S vein at all.

From the court's summary of the evidence it appears that there were mined during the three years, 55,685 tons, of which 104 tons came from the R vein, all the rest from P and Q; that the gross rent therefor amounted to about \$14,584; that the plaintiffs paid the company in cash \$5,160.95, and in houses built \$4,000 more; and that they have yet in hand \$5,423.06 of rent.

Having surrendered the premises at the expiration of the several leases, they instituted this action to recover damages for breach of the company's covenants as contained in clauses or sections 11 and 12 of the lease of 12th April, 1847.

Under the 11th clause the plaintiffs claimed:

1st: For work in faults in R, driving air shafts and improving vein.....	\$1,549.85
2d: For driving faults in P Q and Q Q.....	4,395.00
	<hr/>
Equal to.....	\$5,944.85

And under the 12th clause for timber and construction of chutes and screen building for office, new chutes and fixtures, embankment of railroad, rock tunnel, driving slopes and railroad iron in gangways of P and R and outside..... \$15,032.04

There was evidence that the work had been done and the materials furnished for which the plaintiffs claimed, but defense was taken on several legal grounds, the most important of which I proceed now to state and consider.

1. It was said that the lease of 1847 contains upon a proper construction of it, no covenant for payment for any work done upon the P and Q veins by the plaintiffs.

The court was of opinion that that instrument was a lease only of the R and S veins, but that it contained covenants which reached beyond the veins immediately demised and embraced the P and Q veins, and that the plaintiffs might recover under it for work done upon these veins.

To get at the meaning of the words "said veins," as they occur in the 11th and 12th sections, it is necessary to trace them back through the whole context to the premises, and there we have seen already what the learned judge below admitted, that the thing demised consisted of the R and S veins.

But in the first covenant which follows the formal parts of the lease proper, it is provided that "the said party of the second part shall mine and take away from the said veins and from the P and Q veins, now in possession of the said party, at least 50,000 tons of coal in each and every year during the continuance of this lease, provided the said veins, by all proper management, can be made to yield or produce said quantity of coal;" and it is supposed that here the four veins were so run together and blended that all the subsequent covenants concerning "said veins" refer to the four instead of the two veins; that there was in fact a merger of the two former leases in this one.

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We can not take this view of the matter. For the two purposes of fixing the whole production of the four veins, and making the rents under the three leases payable at one and the same time, this article of the lease does unite the P and Q veins with the R and S veins, and does so far modify the former leases. But this is the whole effect of this covenant. A similar instance is found in the prior leases. By the lease of 1842, 8,000 tons per annum were stipulated for from the Q vein, and when the lease of 1846 was made for the P vein, it stipulated for a joint production from the "two veins" of a quantity of not less than 15,000 tons per annum. Now nobody ever supposed that this was a merger of the lease of 1842 in that of 1846; these plaintiffs certainly did not think so in January, 1847, when they took assignments of each of these leases as still subsisting. Why, then, when a third lease is made on the same principle, should it be accounted a merger of the two former?

Where the same parties are carrying on mining in several veins belonging to the same landlord, and the covenants bind them to work in all the veins, it is advantageous to both parties to fix the rate of production in such manner that if one vein will not yield it another may. It is advantageous to the landlord that he may be sure of his anticipated rent; to the tenant that he may obtain profit in the largest possible amount of coal. Some of the veins may run into fault, whilst increased mining may be carried on in others; or, for many other reasons, preparatory work may have to be done in one vein which shall suspend mining therein, while the hands and implements for mining in that vein may be profitably employed in another. A rigid rule that should require a given number of tons from each vein would lead to frequent disappointment and difficulty, whilst one that fixes the aggregate of all the veins, admits of adaptation of those unforeseen circumstances which in this business are always occurring. It was, we suppose, for the purpose of guarding against contingencies in one vein or another that might affect the gross production, as well as to make all the rents payable at one time, that this covenant was introduced into the lease of 1847, and its whole scope and effect are to be limited to these objects.

The next succeeding covenant proceeds to distribute the

rights and duties of the parties under numerical heads or sections, from 1 to 13, inclusive; and when the expression "said veins" occurs in these sections we are to understand it as referring not to the four veins, grouped in the covenant we have been considering for the special purposes stated, but to the two veins which are the subject-matter of the lease. Established rules of construction require all such detail covenants to be referred to the premises, unless a different reference be clearly indicated by the language used. Here there is nothing to manifest an intention to merge the former leases, and the details arranged throughout these thirteen articles can not apply to the P and Q veins, for they are inconsistent in some points with the regulations prescribed by the former leases for these veins. For instance, it is covenanted in the 4th article that the lessees will, at their own expense, make all necessary improvements for "opening and working the said veins," a provision which it would be absurd to apply to veins already opened, and in which the party promising was then actually engaged in mining. But if the expression "said veins" refers exclusively to the R and S veins in the 4th article, what warrant have we for saying that the same words, when used in the 11th and 12th articles, include the P and Q veins? Obviously none. Covenants, like all other contracts, are to be construed according to the intentions of the parties as nearly as the words will permit; and there is no surer guide to the understanding and intentions of the parties, when words are equivocal, than their acts and declarations under the agreement, called commonly its contemporaneous construction. The conduct of these parties, and especially their correspondence, prove that they understood the lease of 1847 as we have expounded it. We feel great confidence, therefore, in our conclusion that sections 11 and 12 have no reference whatever to the P and Q veins, but that improvements and work in these veins were left to stand for compensation upon the provisions of the prior leases. It may be added that the diversity of rents under the several leases is a strong reason against the assumption of a merger.

2. The next objection taken to the plaintiffs' recovery was that they, having agreed to look for payment for work done upon the R and S veins to compensation by an allowance to

be made out of the coal rents, agreed by them to be paid by the company, can not claim for said work out of any other fund than one arising from rents of the said veins.

We construe the "allowances" of the 12th section to relate to the work provided for in sections 4, 7 and 8, and these allowances, it is expressly stipulated, are to be made from the rents hereinbefore agreed to be paid, which, according to our construction, mean the rents to accrue from the R and S veins. The company seem to have provided by their several leases, that each of their coal veins should pay for its own development. And this is according to the usual course of mining leases. The landlord has invested his money in the title of the coal land—the tenant is expected to invest his in opening and working the veins. Both look for their reimbursements to the coal to be mined; the tenants generally, as in the instance before us, expecting the first fruits, and these to be gathered by deductions from the rent; the landlord to obtain his rent unimpaired after the improvements have been paid for. The lease of 1847 seems to have been constructed on these general and familiar principles. But who is to bear the disappointment when veins thus opened prove inadequate to reimburse the outlays? If the tenant may charge the expenses against the accruing rent of other veins held of the same landlord, he may charge the landlord personally; and then a mining lease, without an express covenant to that effect, amounts to a warranty that coal will be found sufficient to reimburse the cost of opening. The court below held that no such covenant could be implied, and as this opinion is not complained of, we are to take it for the present as correct. In support of it, there is one consideration of considerable weight that might be urged. Mining is so much of an art, that tenants who take leases of this sort, are generally more capable of judging correctly the quality of coal veins than the landlord of whom they lease. It is no uncommon thing to find, in the mining districts, men who never read a page of any scientific work, but who, bred up to the business of mining, understand all the peculiarities of coal veins better and can reason, *a priori*, on their probable yield, more soundly than the most learned professor, who has had no practical experience. Hence it is that when a miner and an owner of coal

lands who is not a miner, come together to treat for a lease, the advantages which always belong to superior knowledge are on the side of the tenant. If he have doubts of the vein to be worked he knows how to prove it before his expenditures are made or stipulated to be made. He is not the party who stands in need of legal implications for his protection; and if he is content to go on without an express covenant of warranty, it will be a grave question, to be decided when it arises, whether he does not go on at his own risk without an implied covenant in his favor. However this may be in general, we must assume that it was so in this instance; and then it is clear from the construction we have adopted that the plaintiff agreed to look for the allowances mentioned in the 12th article to the rents to accrue from the R and S veins. The mistake which the court made in holding that the covenants sued upon reached beyond the premises leased in the instrument containing the covenants, led them to the illogical result of holding the landlords liable for the tenants' mistakes, while at the same time they decided that the tenants took the veins "subject to the ordinary risk of mining, without any covenant, express or implied, of the existence of coal, or of the quantity or of the quality of coal."

The rent of these veins was to be measured by applying the stipulated prices to the number of tons mined. These tons were to be added to the production of the other veins, to make up the stipulated aggregate of 50,000 tons from all the veins, but for the purpose of the rent they were to be estimated separately. This must have been so, because the rate of compensation was different from that fixed in the prior leases for the P and Q veins. And there was no difficulty in keeping a separate account of the production of the R and S veins. It was necessary in settlement with the hands employed, and in point of fact it was done, as appears by the exhibit in the paper books of the mining operations from April 1 to July 1, 1848. To that separate account, and only to that, we hold the allowances stipulated for in section 12 were chargeable.

But the allowances and payments contemplated in the 11th section stand on a different footing. These were to be made for dirt faults and rock faults, and upon our construction for

such faults in the R and S veins only. Of course compensation was not recoverable in this action for rock, slate or dirt faults in P Q or Q Q, and between these veins and the R vein no intermediate veins were found. Nor were the slope and rock tunnel to be compensated in damages, for these were to be made by the tenants "at their own expense," and to be allowed for under the 12th section by deductions from the rent accruing in the R and S veins. But for the dirt, slate and rock faults that should be encountered in driving the gangway of R and S, compensation was to be made—and that generally—and not out of accruing rents or any other particular fund. An important qualification, however, applicable to all these faults, was that the company were first to be consulted, and to approve, "by their assent in writing, of running such gangways in or through any faults."

Here two other grounds of defense are brought to view. In the first place it is said that for the work done in faults the plaintiff can not recover, because it was not done by the written assent of the company, and secondly, that the abandonment of the work by the plaintiffs was a complete bar to any claim made by them under the lease.

If either of these objections is well founded, the plaintiffs were not entitled to recover by virtue of the 11th section; if both, they were doubly barred.

There is no dispute that whatever faults were worked in R were worked without the written assent of the company; but it is insisted and so charged in the declaration, that the defendants waived and dispensed with the requirement of their assent in writing. Suppose they did; would covenant then lie upon a sealed instrument, so modified by parol? Let it be noticed that this was not a condition precedent to be performed by the plaintiffs, and which the defendants might have waived by parol without impairing the integrity of their covenant or the plaintiffs' right of action thereon, but it is part of the very covenant sued on—one of the conditions on which the doing of the work, and the consequent liability of the defendants, were suspended; and if it was changed by parol, the defendants action should have been *assumpsit*, and not covenant. The distinction is taken in *Vicary v. Moore*, 2 Watts, 457, and followed in other cases between an alteration of the plaintiffs'

stipulations, being but conditions precedent to the action, and those of the defendants on which it is directly founded. The performance of the first may be waived, so as to entitle the plaintiffs, without more, to an action on the defendants' covenants, but to sustain a count based specifically on covenants modified by parol, would require us to give to the whole the quality and effect of a specialty. The cases of *Green v. Roberts*, 5 Wh. 85, and *McCombs v. McKennan*, 2 W. & S. 218, cited in argument, are referable to this distinction.

The law of all the cases is, that when a plaintiff sues on a covenant which has been modified by parol in a point essential to the defendants' liability, the action should be *assumpsit*, "the written contract being treated as abandoned or used no further than to mark the terms and extent of the new stipulations."

Now the defendants in this case covenanted to pay for work that should be done under their written assent. They are sued on that covenant and it is alleged as a part of the plaintiffs' case, that the written assent was dispensed with and the parol assent substituted, and this alteration of the covenant, if ever made, was by parol. The contract then is no longer the covenant that was sealed, and the remedy must change with the contract. It is suggested that the action of covenant in Pennsylvania is an equitable action. Before our equity powers were full blown, this action was sometimes made to answer the purpose of a bill in equity, and now, under a plea of covenants performed with leave, etc., an equitable defense may be given in evidence; but the action, so far as regards the instrument sued on, is strictly an action at law, upon a contract under seal. A party who brings such an action, and can not make out a breach of the defendants' covenant, as it stands written, signed and sealed, has no case in a court of law. To bring down the covenant to parol in his declaration in order to suit his evidence, is to defeat his action.

It is apparent from all this case, however, that there never was a parol modification of the defendants' covenant. The lease stipulated that the mining should be done under the eye of the defendants' agent and the plaintiffs proved that he assented to the work for which they claim damages. In the pleadings their case is that of a covenant modified by parol—

in the evidence that of a covenant performed, not according to its tenor, but to the satisfaction of the defendants' agent. The agent denies his assent and on this point, as is usual with parol evidence, there is conflict. It was to exclude such a conflict that the parties stipulated for the written assent, not of an agent of the company, but of the company themselves. There was no proof that the agent had authority to waive this stipulation. What then did this acquiescence amount to? At most to an implied assumpsit, on which the company may possibly be liable for a *quantum meruit*; but it is too clear for argument that the acquiescence of the agent could not make them liable in covenant on the sealed instrument. Covenanting to pay for such work only as should be done under their written assent, they are not liable in this action for work done under the mere oral assent of an agent.

It would seem that the parties contemplated the occurrence of faults as a possible, but not very probable contingency. The plaintiffs bound themselves to push on their gangways with "all proper management, means, efforts and exertions," and if faults should occur they might cut through them at their own expense, without consulting the company, for the sake of reaching the coal, or if they meant to charge the company, they should give the company an opportunity to decide on prosecuting or abandoning the work, and their written assent to its prosecution should be the evidence of the corporate liability to pay for it. That the fault was to be tested before the company should be called on to decide whether to stop or proceed, is shown by the provision that ten yards lineal mining into the fault was to be done by the plaintiffs without compensation, and the excess only to be paid for by the company, and that after being first consulted, and approving by their assent in writing. When the plaintiffs undertook to work beyond the ten yards, without the stipulated consultation and assent, they did that which was lawful and proper, and which seemed perhaps to the best of their own interests, but which they knew, if they ever read their own agreement, would not make the company liable to them.

The other ground of defense, that the abandonment of the work before the expiration of the term named in the lease was a bar to the action, need not be discussed, for the point

last noticed is decisive against the plaintiffs' right on the 11th section.

Nor is it necessary to consider another question suggested—whether, under the pleadings, the plaintiffs could recover back money once voluntarily paid; for the only ground on which they are entitled to recover at all is that which is found in the 12th section, and that is limited to the rents which accrued in the R vein. But they have confessedly in their hands more of the company's money than these rents amounted to, so that they were not entitled to a verdict on the only ground that their action had to rest upon.

It is obvious that the construction we have given to the lease would have led to the rejection of the evidence mentioned in the first error assigned, and to instructions that would have prevented a recovery.

It may be true that we are administering a severe measure of justice; but the plaintiffs made the contract such as it is, and if there be hardship in the case, it is self-imposed. Courts of justice are doing their appropriate work when they hold parties to the plain meaning of their written contracts. We only expound and enforce that which they agreed should be the rule of their conduct.

The judgment is reversed, and a venire de novo is awarded.

PERRY V. ATTWOOD ET AL.

(6 El. & Bl. 691. Queen's Bench, 1856.)

Account for tonnage rent previously settled on erroneous statements.

The declaration alleged that plaintiff let mines to defendant at an annual rent and a tonnage rent, the terms being so arranged that the tonnage was to make the mine pay; one year with another, £100 per annum; and as breach of covenant, the failure to pay. The plea alleged an annual accounting, and acceptance by payment of the amount agreed upon. The reply averred the omission of items of ore by mistake and plaintiff's ignorance of the facts: *Held*, that a plea showing only statement of accounts on one side did not show an accounting, binding on plaintiff; and in any event the reply was sufficient to avoid the plea, by the allegation of error in the account.

Ore settlements not conclusive. Settlements between lessor and tenant of mines of amounts of ore got and tonnage paid, are not conclusive when shown to be erroneous or made in ignorance, and such error may be shown in an action on the covenants of the lease, and need not first be reformed in equity.

¹ **Mistake vacates settlement.** Successive annual statements are disturbed by the court with regret. But payments accepted as in full of account, which account is itself wrong, and *ex parte* do not amount to accord and satisfaction, and only amount to partial payments.

"Errors excepted:" it is common to add to a statement of accounts, but the exception must be understood, even where not expressed.

The declaration stated that Robert Jefferson, since deceased, and plaintiff, by deed, let to defendants certain mines and veins of iron ore, with liberties and powers for digging, etc., to have and to hold the said mines and veins, with the said liberties, etc., to defendants, their executors, administrators and assigns, from 25th March, 1846, for the term of twenty-one years (determinable as in deed mentioned), "yielding and paying therefor, unto the said Robert Jefferson, and the plaintiff, and the survivor of them, and their assigns, or the heirs or assigns of such survivor, yearly and every year during the said term, the clear annual rent or sum of £400 of lawful British money, without any deduction or abatement whatsoever (except for property tax, and any other tax usually payable by landlords) if any, (in the said county in respect of similar property), and by two equal and even half-yearly payments; that is to say," etc.; "such rent to be payable and paid as aforesaid, whether the said mines and minerals should or should not be opened and worked, and whether there should or should not be found any iron ore therein. And also yielding and paying, in manner aforesaid, unto the said R. Jefferson and the plaintiff, and the survivor of them, and their assigns, or the heirs and assigns of such survivor, yearly and every year, during the said term, the rent or sum of 2s. 9d., for every ton of iron ore, commonly called Cumberland Red Ore, which should be dug, wrought, won, raised, obtained and gotten in, from or out of the said mines, pits, working lands and premises, by virtue of the provisions of the said deed; each ton consisting of," etc., (mode of estimating tonnage); "such tonnage rent to be calculated

¹ *Beaumont v. Boulton*, 1 M. R. 263.

up to and payable and paid on the 25th day of March in each and every year of the said term; provided always, and it was thereby declared and agreed by and between the said R. Jefferson and the plaintiff and the defendants, respectively, that in any year or years of the said term, when the tonnage rent as aforesaid, or the iron ore and minerals raised, won, gotten, and obtained in and from the said lands and premises in such year or years, should amount altogether to the sum of £400 or upwards, then the said tonnage rents, when paid, should be taken and considered as payment for and instead of the said annual fixed rent of £400, and the said fixed rent, in such year or years, should not be payable; and, if it should happen in any subsequent year or years that no ore or minerals should have been raised and gotten in and from the said lands, as aforesaid, or the tonnage rents thereon should not amount altogether to the said sum of £400, then the said fixed rent of £400 should be paid, and the deficiency in quantity of such year or years should be made up by deductions from the quantities of ore and minerals raised and gotten in any subsequent year or years beyond the quantities raised (and at the tonnage rent aforesaid) equivalent to the said fixed rent for such subsequent year or years; so that the tonnage rent or rents should not be paid or payable on the ore and minerals subsequently raised and gotten until the deficiency in quantity of any of the previous years should be made up as aforesaid; provided, also, that in case the defendants, their executors, administrators or assigns, should, in any preceding year or years of the said term, by reason of the extended working of the said mines, pay any sum or sums of money over and above the said fixed rent or sum of £400, and the said mines should not, by due and ordinary working thereof, in any subsequent year or years of the said term, afford a supply of ore equal, after the rate aforesaid, to the annual sum of £400, then, and in such case, it should and might be lawful for the defendants, their executors, administrators and assigns, to take credit in account and to set off against the said fixed rent so much of the previous payment of excess of rent, beyond £400 in any one or more years, as, with the ore raised in such year, should, at and after the rate of tonnage aforesaid, be equal to make up the

sum of £400 for that year; it being the true intent and meaning of the said parties thereto that a rent of £400 per annum, payable half yearly, should at all events be paid *communibus annis*, during the term, for the license or leave thereby granted, and that if more than £400 should have been paid in any one year, and, by reason of the extra workings in any one or more year or years, or poverty of the said mine and premises, they should not be capable of yielding, on the ordinary working thereof, in any subsequent year, sufficient ore to pay the said fixed rent, calculating the ore raised after the rate aforesaid, the defendants should not be liable to pay in the whole of the said term a larger rent than the said sum of £400 per year, inclusive of, and with, the extra rent so raised and paid by way of tonnage rent in previous years. And the defendants, by the said deed, covenanted with the said R. Jefferson and the plaintiff, their heirs and assigns, that they, the defendants, their heirs, executors, administrators, or assigns, or some or one of them, should and would well and truly pay, or cause to be paid, during the continuance of the said term thereby granted as aforesaid, unto the said R. Jefferson and the plaintiff, their heirs or assigns, the said annual rent or sum of £400, and also the said tonnage rent so reserved as aforesaid, subject, nevertheless, as aforesaid, on the several days and times and in the proportions, manner and form, so mentioned and appointed in the said deed for payment thereof respectively, as aforesaid, and according to the true intent and meaning of the said deed. And the defendants, by the said deed, also covenanted with the said R. Jefferson and the plaintiff, their heirs or assigns, that they, the defendants, their executors or administrators, should and would provide and keep such and so many books of account as might be necessary, and wherein should be entered a full, true, and particular account in writing of all the iron ore and minerals which should be dug, won, raised, obtained, and gotten in, from, or out of the said mines, pits and workings, and thereof should deliver to the said lessees, their heirs or assigns, a fair copy in writing of such account, monthly, during the said term." Averment: "That of the said fixed annual rent, so reserved as aforesaid, there is due and unpaid the sum of £200 for one half year of the said term, end-

ing on " 29th September, 1855; "and that of the said tonnage rent, so reserved as aforesaid, there is due and unpaid for iron ore, dug, wrought, won, raised, obtained, and gotten by the defendants, under and by virtue of the provisions of the said deed, the sum of £2,000 according to the true intent and meaning of the said deed." Further breach in respect of defendants not keeping books or delivering accounts.

Plea (7), "to so much of the declaration as relates to tonnage rent alleged to have become due and payable by the defendants, under and by virtue of the said deed, for and during the eight years of the said term, commencing with the year ending the 25th day of March, 1847, and ending with the year ending the 25th day of March, in the year of our Lord 1854."

That defendants "did, during the said eight years of the said term, commencing with the year ending on the 25th day of March, in the year of our Lord 1847, and ending with the year ending on the 25th day of March, in the year of our Lord 1854, provide and keep such books of account as were necessary, and that they cause to be entered therein an account purporting to be, and which defendants believed and still do believe to be, a full, true and particular account in writing, of all the iron ore and minerals dug, won, raised, obtained and gotten in, from, or out of the said mines and premises in the said deed mentioned." That soon after the expiration of each of the said eight years of the said term, the account so entered by the defendants in the said books was submitted for examination and correction to the plaintiff and the said R. Jefferson, in the lifetime of the said R. Jefferson, or to their agent in that behalf duly authorized, and to the plaintiff alone since the death of the said R. Jefferson, or to his agent in that behalf duly authorized.

"That soon and after the expiration of each of the said eight years of the said term, and after the said accounts so from time to time rendered by the defendants had been examined by or on behalf of the plaintiff and the said R. Jefferson, in the lifetime of the said R. Jefferson, and by or on behalf of the said plaintiff, since the death of the said R. Jefferson, the defendants and the plaintiff, and the said R. Jefferson, in the lifetime of the said R. Jefferson, and the defendants and the

plaintiff alone, since the death of said R. Jefferson, stated an account of and concerning all the iron ore dug, won, raised, obtained and gotten by the defendants, during the preceding year of the said term, in, from or out of the said mines and premises, by virtue of the provisions of the said deed, and of and concerning the amount of tonnage rent payable by the defendants, under or by virtue of the said deed, for and in respect of the same iron ore; and that upon each of the first two of such accountings, the same having taken place in the lifetime of the said R. Jefferson, a certain sum was agreed, by and between the defendants and the plaintiff and the said R. Jefferson, to be the balance or sum due from the defendants to the said plaintiff and the said R. Jefferson; which balances or sums respectively were, soon afterward, paid by the defendants to the said plaintiff and the said R. Jefferson, and accepted by them, as and for and in full satisfaction and discharge of the tonnage rent, payable by the defendants to the plaintiff and the said R. Jefferson, by virtue of the said deed, for the years of the said term ending on the 25th day of March, 1847, and the 25th day of March, 1848, and that upon each of the remaining six of such accountings, the same having all taken place after the death of the said R. Jefferson, a certain sum was agreed, by and between the plaintiff and the defendants, to be the balance or sum due from the defendants to the said plaintiff; which balances or sums, respectively, were afterward paid by the defendants to the plaintiff, and by him accepted, as and for and in full satisfaction and discharge of the tonnage rent payable by the defendants to the plaintiff by virtue of the said deed, for the year of the said term ending on the 25th day of March, 1849, and for the five successive following years of the said term, ending on the 25th day of March in each year."

"That all the said eight balances or sums were paid and accented as aforesaid, more than three months before the commencement of this action."

Replication (2) to plea 7. "That the supposed accountings in that plea mentioned, were not true and correct accountings, according to the true intent and meaning of the said deed, of or concerning all the iron ore dug, won, raised, obtained, and gotten by the defendants under the said deed,

during the respective periods for which the said supposed accountings were respectively had or made, or of or concerning all the tonnage rent payable by the defendants, under or by virtue of the said deed, for or in respect of the same iron ore; but, on the contrary thereof, were, and each of them was, erroneous in this, that divers and very many tons of iron ore, which ought to have been included and taken into account in and upon the said supposed accountings respectively, and divers large amounts of tonnage rent payable by the defendants in respect thereof, under and by virtue of the said deed, were, by and through mistake, and in ignorance of the facts on the part of the plaintiff and the said Robert Jefferson and their agents in their behalf, so far as relates to each of the first two of the said supposed accountings, and by and through mistake, and in ignorance of the facts on the part of the plaintiff alone, and his agents in that behalf, so far as relates to each of the residue of the said supposed accountings, omitted from, and not included or taken into account in or upon the said supposed accountings respectively; and the balances or sums alleged to have been found and agreed to be due from the defendants for tonnage rent upon the said supposed accountings respectively, as in the said seventh plea mentioned, were erroneously found and agreed to be the balances or sums due from the defendants for the full amounts of tonnage rent payable by the defendants under the said deed, for the respective periods for which the said supposed accountings were respectively had and made: whereas, in truth and in fact, the said balances or sums were respectively balances or sums due from the defendants for tonnage rent, under the said deed, for fewer tons of iron ore for which tonnage rent was payable by the defendants, according to the true intent and meaning of the said deed, than had been actually dug, won, raised, obtained and gotten by the defendants under the said deed during the respective periods for which the said supposed accountings were respectively had and made."

"That the balances or sums, so erroneously found and agreed to be due from the defendants for tonnage rent upon the said supposed accountings respectively, were respectively paid and accepted, as and for and in full satisfaction and discharge of the respective amounts so erroneously found and

agreed to be due from the defendants for tonnage rent upon the said supposed accountings respectively, and not otherwise howsoever."

The plaintiff also demurred to plea 7. Joinder.

Demurrer to the above replication. Joinder.

ATHERTON, for the plaintiff.

First, the plea is bad. It shows only an account stated on one side, introducing, therefore, no consideration for the agreement, which it set up: *Smith v. Page*, 15 M. & W. 683. It would be otherwise if there had been a statement of cross accounts and a balance agreed to. The facts pleaded show no more, at the utmost, than evidence that the account really stood as stated. If it be said that the conduct of the plaintiff, as shown in the plea, renders the account conclusive till its correctness be impeached, the replication does in fact impeach the correctness, and truly, as admitted by the demurrer.

[Lord CAMPBELL, C. J.—It is common to add to a statement of accounts, "errors excepted;" I think that such exception must be understood, even where not expressed.]

MANISTY, *contra*.—Where there is a claim by one party upon another, and it is difficult to arrive at the precise amount, then, if, for the purpose of preventing the inconvenience of unsettled accounts, the parties agree to meet from year to year, and, on such meeting, agree to take a certain sum as the balance, both are bound, in the absence of fraud. Here fraud is not alleged, and the record shows a relation between the parties, and a contract which would produce accounts of much intricacy.

[Lord CAMPBELL, C. J.—You put that as applicable to cases where the balance is not to be arrived at by mere enumeration.]

In *M'Kellar v. Wallace*, 8 Moore's P. C. 378, 401, the law was thus laid down in the Privy Council: "Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases,

that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts, and if it afterward turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a court of equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance—a sum which one is willing to pay, and the other is content to receive as the result of those accounts—it is obvious that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing these vouchers, upon the assumption that there are or may be errors in the account so settled; therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud.”

[Lord CAMPBELL, C. J.—That would be a case of accord and satisfaction.] The present case is so. It is clear that the defendants could not disturb the balance struck. The plea relies, not on the balance being in fact as found, but upon the agreement that it should be taken as the balance. In *Smith v. Page*, 15 M. & W. 683, the plea relied upon the balance being found to be due and being due. But, at any rate, that case must be considered as qualified by the later case of *Callander v. Howard*, 10 Com. B. 290, where it was held that a plea of accounting, and payment of the balance found, showed a good defense, though it might be an argumentative plea of payment; [Lord CAMPBELL, C. J.—It can hardly be a plea of payment; it does not show that what was claimed by the declaration has been paid. In *Smith v. Page*, the court expressly distinguishes the case from one where there are cross-demands as there were in *Callander v. Howard*.] The principle first suggested, that a smaller sum than that really due may be agreed upon as a balance, for the purpose of settling demands otherwise incapable of being ascertained, will support this plea.

[Lord CAMPBELL, C. J.—How is it incapable of being ascertained more than the sum due upon a sale of coals or wheat?] A peculiar mode of measuring is here prescribed,

and a very complex arrangement is made, extending through a series of years. As to the replication, it admits the agreement, and the payment of the balance agreed upon; it sets up a mistake of the parties, which is no answer in law, fraud not being suggested.

ATHERTON was not called upon to reply.

LORD CAMPBELL, C. J.

I am sorry that several successive yearly settlements should be disturbed, but we must decide upon the legal result of what has passed. It seems to me that the plea is insufficient, the account on one side only having been stated, which brings the case within the authority of *Smith v. Page*. The proceeding shown is not in the nature of accord and satisfaction, nor does it bind the parties; all that is said is that there was a settlement of the account of claims on one side, a balance stated, and a payment of that balance. No weight is to be attached to the allegation that the payment was given and accepted in satisfaction of the tonnage rent due; there appears no consideration for a waiver of the debt actually due. The case does not fall within *M'Kellar v. Wallace*, 8 Moore's P. C. C. 378, or *Callander v. Howard*, 10 Com. B. 290. If there were any doubt as to the plea, the replication would supply a complete answer, unless we could hold that a settlement of a claim at any one time was conclusive, and could not be questioned on the ground of mistake. As we can not so hold, we must give judgment for the plaintiff.

COLERIDGE, J.—I am of the same opinion. The plea certainly does not give a conclusive answer, and that being so, the replication answers the *prima facie* answer given by the plea. The plea shows that it was agreed that a certain sum was the balance, and that this sum was paid. If it was meant that this sum was the real amount of the claim, the defendants would have pleaded payment. But this the plea cautiously avoids and alleges only a payment of the supposed balance. The plaintiff answers: "True, but it turns out that the supposition was wrong." It would be a bad state of the law if such a settlement were conclusive, and could not be set right at law, and the only remedy were in equity.

ERLE, J.—We are to look to the contract of the parties. Their meeting and agreeing to a balance, and the payment of that balance do not constitute a performance. The arguments urged by Mr. Manisty show that it would be well worth the while of parties in the first instance, to agree that every settlement after three years or some other time named should be conclusive. But, in default of such an agreement, I can not find any rule leading us to hold that what has here taken place is a performance of the contract.

Judgment for plaintiff.

(CROMPTON, J., had left the court.)

BURK V. SPENCER.

(26 Connecticut, 159. Supreme Court of Errors, 1857.)

Outstanding mortgage will not defeat ejectment. A defendant in ejectment can not set up an outstanding mortgage of the plaintiff either to show title in a stranger, or to show a variance between the title claimed and the title proved.

¹ **Mining lease construed to include all purposes.** The demise of land within defined boundaries in the ordinary form, followed in the *habendum* with "together with the quarry," etc., and the privilege of a wharf for use in hewing stones thereon, the rental being a royalty on the stone quarried: *Held*, a general demise without restriction of use although the main object may have been to allow of quarrying.

Parol evidence not allowed to control clear contract. Where there is no ambiguity in the terms of the lease parol evidence will not be let in to show that the lessee was to be restricted to particular purposes in his use of the leased ground.

² **Assignee of recorded lease against parol tenant.** The owner in fee let a tract of land for a term of years by lease duly executed and recorded. Afterward with the assent of the tenant he resumed possession of a part of the demised premises and let the same by parol to S. While S. remained in possession of such part, the tenant for years, for a valuable consideration, conveyed all his interest to B., who had no knowledge of the lease to S. *Held*, that the parol lease to S. could not avail against ejectment brought by B.

¹ *Owings v. Emery*, 8 M. R. 387.

² For further proceedings on this same lease, see *Brainerd v. Arnold*, *post* 478.

Action of disseizin, tried to the jury on the general issue with notice, at the term of the superior court held at Had-dam, in November, 1856.

The demanded premises consisted of about one quarter of an acre of land with a dwelling house thereon, in Middle-town, and constituted part of a tract containing about thirty acres. In February, 1853, Jeremiah Brainerd, then owner in fee of the whole tract (the dwelling house not then being thereon), by lease duly executed and recorded, demised the same to Samuel Arnold, 2d, and Isaac Arnold, "together with the quarry or quarries thereon, and the privilege of getting out stone in the same; also the privilege of getting out stone in or on any part of said lot or piece of land, and to use and occupy said land in any manner they may choose, and for all purposes necessary and convenient for carrying on the quarrying business, for the term of twenty years from the first day of April, 1853, to have and to hold," etc., "the said Samuel and Isaac Arnold paying the said Brainerd seven per cent. on the price of all the stone they may quarry or get out on said land and sell, the percentage to be reckoned on the value of the stone when quarried and unhewed, or in the rough; payment to be made in a reasonable time after the sale of and payment for said stone, and not before." The lease also gave to the lessees for the same term the use of a wharf for the purpose of hewing stones upon it and shipping them therefrom.

In June, 1856, the Arnolds, for a valuable consideration, conveyed to the plaintiff, by quitclaim deed, in the common form, their interest in the property so leased to them; and the plaintiff mortgaged back to them the same interest to secure the payment of certain notes.

In 1855, however, the said Brainerd, having obtained permission from the Arnolds to occupy the demanded premises, which were situated at some distance from the quarry, with their assent removed a small building thereto, and leased it and the demanded premises by parol to the defendant; all of which was unknown to the plaintiff at the time of his purchase. The defendant, at the time when the suit was brought, was occupying the building as a dwelling house, and was in possession of the demanded premises, claiming title thereto under the parol lease from Brainerd.

Upon the trial the plaintiff offered in evidence the lease from Brainerd to the Arnolds, and the quitclaim deed from the Arnolds to the plaintiff; and no other evidence of his title to the demanded premises was offered by him or heard by the jury. The defendant claimed title in himself under the parol lease from Brainerd, and also offered in evidence the mortgage deed before mentioned from the plaintiff to the Arnolds. Upon these facts the defendant asked the court to charge the jury that the legal title was not in the plaintiff, and that he could not sustain his action. But the court instructed them that the plaintiff could sustain his action notwithstanding the mortgage, as the defendant was a stranger thereto.

The plaintiff's declaration averred that the plaintiff was "well seized and possessed" of the demanded premises, "in his own right as a tenant for years." The defendant asked the court to charge the jury that the evidence of title upon which the plaintiff relied did not sustain the averment that he was tenant for years, but was variant and not admissible for that purpose; but the court charged that the evidence was admissible for that purpose and that it fully sustained the averment.

The defendant claimed that the intention of Brainerd in giving the lease to the Arnolds was to convey to them the right to work a quarry on the premises and nothing more, and that the professed object of the Arnolds in procuring the lease was to acquire that right only; and for the purpose of aiding in giving a construction to the lease, the defendant offered evidence of a certain conversation between the parties to the lease in relation to the purpose for which it was desired and given; and for the same purpose the defendant offered evidence that the land described in the lease was mostly woodland, and that its value consisted chiefly in the trees growing thereon, and that the quarry occupied but a limited portion of the tract. To this evidence the plaintiff objected, and the court rejected it.

The defendant also asked the court to charge the jury that the intention of the parties to the lease, as manifested by the terms of the lease itself, was to convey and acquire respectively nothing more than a right to work the quarry on the tract. The court, however, charged the jury that the lease conferred

upon the lessees the right to occupy all the land in such manner as they should see fit.

The jury found a verdict for the plaintiff, and the defendant moved for a new trial.

BARNES and CHAPMAN, in support of the motion.

TYLER and CULVER, *contra*.

HINMAN, J.

The first question is whether an outstanding mortgage to a stranger can be set up by a defendant, to defeat a recovery in an action of ejectment. This was the precise question which this court decided in the case of *Porter v. Seeley*, 13 Conn. 564, after great deliberation, and the court again, to this extent, expressly affirm that decision in the case of *Smith v. Vincent*, 15 Conn. 1. The authority of two recent decisions on the point ought to be sufficient, without further reference to authority, or any reasoning on the subject.

The plaintiff's title was under a quitclaim deed from Samuel Arnold and Isaac Arnold, and their title was by lease from the former proprietor, for the period of twenty years, which term being unexpired, the plaintiff was tenant for years, as he is alleged to be in the declaration.

It is said, however, that he is only tenant for years of an equity of redemption, because he had mortgaged the property to the Arnolds. But if this mortgage can not be shown, as we have said it can not be, being to a stranger, then, as between these parties, it is the same as if it did not exist. There is therefore no variance between the title stated and the title proved.

For the purpose of aiding in giving a construction to the lease from Brainerd to the Arnolds, the defendant offered to prove the conversation between the parties to the lease in relation to the purpose for which it was given and received. He also offered to prove that the premises were principally wood and timber land with a quarry thereon, for the purpose of showing that the only object was to lease the right to quarry upon the land. The court rejected this evidence, and this is

complained of by the defendant. If the terms of the lease were ambiguous in respect to whether the lessees took only a right to quarry stone upon the land, then perhaps the fact that the land was such as not to admit of any other profitable use without committing waste would be a circumstance proper to be considered in giving it a construction. But in this lease there is no ambiguity. No doubt the main object of the lessees was to quarry stone, because the rent is regulated by the amount and value of the stone quarried, and they were to have the use of a wharf for the purpose of hewing stones upon it and shipping them therefrom. But they are not restricted to this use of the land. The land within the specified boundaries is demised and leased to them in the ordinary form, and the right to quarry stone is superadded to the ordinary use to which the lessees were entitled. We think, therefore, that the court below was correct in excluding this evidence, as it most obviously went to vary the plain and explicit language of the lease.

Before the plaintiff took his deed, the Messrs. Arnold had, by parol, permitted their lessor to place the small house which stands upon the demanded premises, and is now occupied by the defendant, upon the land, and the defendant is in the occupation of said house under a parol lease from said lessor of the Arnolds; but this fact was unknown to the plaintiff at the time he took his deed and at the time this suit was brought. The plaintiff, finding by the record a clear lease to the Arnolds of the whole property, including the demanded premises, and having no knowledge that the defendant or any one else claimed any interest therein, obviously ought not to be bound by any parol license from their lessors, even assuming that, as between the Arnolds and Brainerd, the parol license was, under the circumstances, such that the Arnolds would have no right to interfere with the occupancy of the house which they had permitted to be placed upon the land. Had the Arnolds given a deed of the premises before they conveyed to the plaintiff, still without any notice of such a deed, and in the absence of any record of it, the plaintiff would be protected, and surely a parol lease or license can have no greater effect than a deed not recorded. We think, therefore, that the court was correct in holding that this was no

bar to the plaintiff's right of recovery. On the whole case, therefore, we do not advise a new trial.

In this opinion the other judges concurred.

New trial not advised.

COX ET AL. V. BISHOP ET AL.

(8 DeGex, M. & G. 815. High Court of Chancery, 1857.)

Relation of lessor to equitable assignee. An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue such equitable assignee in equity on the covenants of the lease.

This was an appeal by the defendants, Bishop, Livesley and Powell, who were equitable assignees of a lease, from an order of the master of the rolls overruling a demurrer for want of equity to a bill by the landlords.

The following is the substance of the statements of the bill:

By an indenture of lease dated the first of December, 1852, the plaintiffs demised to Richard Smethurst certain beds of coal and marl under some closes of land at Hanley, and the surface of one of the closes, reserving a minimum rent of £300 for coal and of £100 for marl, and a fixed rent of £6 for the surface of the demised close. By this lease Smethurst covenanted to work and continue to work the mines in a proper manner, not to assign without the consent in writing of the lessors, and to make good all damage done to the surface or to any buildings upon the land. There was a proviso for re-entry on non-payment of rent or breach of covenants.

At the time of the execution of the lease, it had been agreed between Richard Smethurst, the lessee, and Joseph Smethurst (since deceased), who was a brother of the lessee, and was in possession of all of the closes of land under which the mines lay, except the close the surface of which was comprised in the lease, that Joseph Smethurst should be interested in the lease equally with Richard Smethurst. This fact was known

to the plaintiffs, and the lease was granted to Richard Smethurst for the benefit of himself and his brother Joseph. Richard and Joseph Smethurst commenced sinking a shaft, and working the mines in the usual mode, but soon after the date of the lease they, without the sanction or privity of the plaintiffs, associated with themselves a Mr. James Weatherburn in working the mines. The working was carried on by these persons until June, 1853, at which time an agreement was entered into between Richard Smethurst and James Weatherburn, of the one part, and Joseph Smethurst, Wykeham Wheeler and Frederick Bishop, of the other part, whereby it was agreed that Richard Smethurst and Weatherburn should give up their right and interest in the lease and in the colliery, mines, machinery and premises comprised therein to the parties of the second part, and that they would do and execute all reasonable and necessary acts and deeds for carrying out that agreement and for vesting the colliery in the parties of the second part, and that in the meanwhile and until the execution of such deeds the agreement should have the same force and effect, and the parties of the second part should be at liberty to act as if such deeds had been already executed.

Joseph Smethurst, Wykeham Wheeler and Frederick Bishop entered upon the premises under this agreement, and worked the colliery until the 3d of September, 1853, when Wheeler sold his share to the defendants, Bishop, Livesley and Powell, who worked the colliery in conjunction with Joseph Smethurst until his death, in December, 1853.

After the death of Joseph Smethurst, Bishop, Livesley and Powell continued in possession of the colliery and worked it until December, 1855, when they abandoned the further working, and by a deed dated the 22d of that month assigned the demised premises, with the machinery and plant, to one Matthew Fisher, who was a person of no substance.

The bill further alleged that, during the occupation by Bishop, Livesley and Powell, and by Joseph Smethurst in his lifetime, very large quantities of coal had been raised, but that no rent or royalty, either as mineral or surface rent, had been paid, and that during their occupation the works had not been carried on properly, and that the demised premises had sustained great damage in consequence of negligence and improper working.

The bill charged that Joseph Smethurst, Wheeler, Bishop, Livesley and Powell had occupied and worked the colliery and lands under the lease to R. Smethurst, and that they were well acquainted with its provisions and stipulations, and that they had always held themselves out as assignees of the lease, and as entitled to the benefit thereof, but that the plaintiffs were not parties or privies to the agreement of June, 1853, nor to the sale to Bishop, Livesley and Powell, nor to the assignment to Fisher, and that such agreement, assignment and sale were frauds on the plaintiffs.

The bill, which was filed against Bishop, Livesley, Powell, Wheeler, and the executors of Joseph Smethurst, prayed that it might be declared that the defendants were liable to pay the surface rent and the minimum coal and marl rents up to the time of the assignment to Fisher, and that they were bound to compensate the plaintiffs for all loss sustained by them in consequence of the colliery not having been properly worked; that the amount of such rents and compensation might be ascertained, and that the defendants might be decreed to pay it.

Bishop, Livesley and Powell demurred for want of equity. The master of the rolls overruled the demurrer, holding that an equitable assignee of a lease, who has been put into possession and enjoyed the property as assignee, is liable in equity to the lessor for the performance of the covenants.

Mr. LLOYD and Mr. SHAPTER, for the appellants.—The question is whether a person who, by virtue of a contract with a lessee is entitled in equity to the lessee's interest, is liable in equity to the landlord to the same extent as he would be liable at law if a legal assignment had been made. We say, first, that the contract itself can not give the landlord any right to sue in equity, for it is a contract between other parties with which he has nothing to do.

Mr. ROUNDELL PALMER.—We do not allege that the contract alone, not followed by possession, would give the landlord any such right.

Possession can not alter the case, for it does not create any privity with the landlord. There is none between the landlord and an under-lessee in possession. The landlord has no

equity to make a person his tenant who is not such at law and has entered into no contract with him. *Lucas v. Comerford*, 3 Bro. C. C. 166; 1 Ves., Jr., 235; 8 Sim. 499, and *Flight v. Bentley*, 7 Sim. 149, are against us, but they were overruled in *Moore v. Choat*, 8 Sim. 508. And the subsequent decisions have been almost uniformly in our favor: *Moore v. Greg*, 2 DeG. & Sm. 304; 2 Phill. 717; *Robinson v. Rosher*, 1 Y. & C. C. 7; *Arkwright v. Colt*, 2 Y. & C. C. 4; *Walters v. Northern Coal Co.*, 5 DeG., M. & G. 629. In *Jenkins v. Portman*, 1 Keen, 435, there was a privity of contract between the parties to the suit; the defendant was landlord and was also the *cestui que trust* of an underlease of the same property, and it was rightly held that, as between him and his lessee, he could not throw upon the lessee the burden of doing things which, as between landlord and lessee, the lessee was bound to do, but, as between lessee and under-lessee, the under-lessee was the person bound to do. The master of the rolls, it is admitted, rests his judgment on *Lucas v. Comerford*, but there was a clear equity independently of that case. *Close v. Wilberforce*, 1 Beav. 112, was a case between the lessee and an assignee of the beneficial interest, and *Wilson v. Leonard*, 3 Beav. 373, was between vendor and purchaser, between whom there is a privity of contract, so neither of those cases have the slightest bearing on the present. In *Clavering v. Westley*, 3 Peere Wms. 402, there was a trust, and also insolvency, which might raise the same kind of equity as that enforced in *Powles v. Hargreaves*, 3 DeG. M. & G. 430. In *Sanders v. Benson*, 4 Beav. 350, Lord Langdale expressed an opinion opposed to our view, but the bill was dismissed on another ground, so his remark can hardly be considered more than a *dictum*, while *Walters v. Northern Coal Mining Company*, which is the last authority on the subject, is almost on all-fours with the present case. In both *Close v. Wilberforce* and *Jenkins v. Portman*, 1 Keen, 435, 454, it is said that possession is not more material in equity than at law. Now at law it goes for nothing; it is not needed to create a liability to the landlord in the case of an assignment, and it is insufficient to create any in the case of an under-lease. The allegation as to fraud is nothing; a leaseholder may assign to a pauper: *Taylor v. Shum*, 1 Bos. & Pul. 21; and an

agreement to assign is an act of which the landlord can not possibly complain.

Mr. ROUNDELL PALMER and Mr. HISLOP CLARKE, in support of the bill.

The decision of the master of the rolls is not inconsistent with any of the authorities, and can not be reversed without overruling at least two of them. We do not rely on *Lucas v. Comerford*, 3 Bro. C. C. 166; 1 Ves. Jr. 235; 8 Sim. 499; but, to say the least, it does not make against us. *Flight v. Bentley*, 7 Sim. 149, is, no doubt, overruled by *Moore v. Choat*, 8 Sim. 508; but those were cases of mere equitable mortgage by deposit of a lease, and the vice-chancellor, in *Moore v. Choat*, expressly refers to the fact that possession had not been taken. Moreover, a mortgage and an absolute assignment stand on a very different footing. *Robinson v. Rosher* and *Arkwright v. Colt* similarly leave untouched the case of an equitable assignment followed by possession under it. *Moore v. Grey* only decided that a landlord had no right to compel an equitable assignee to make himself a legal assignee, and there is no difficulty about that case, for a person not party or privy to a contract can have no right to compel specific performance of it. These are all the cases that relate to an equitable assignee of a lease. *Walters v. The Northern Coal Co.* is a case of a different class. In that case there was an equitable title co-existent and consistent all along with the legal title, and an assignment would have been inconsistent with the nature of the contract, and so would the equitable relief which was sought.

Clavering v. Westley was similar in its circumstances, and the overruling it in *Walters v. The Northern Coal Company* decides nothing against us. None, therefore, of the authorities are against us. *Close v. Wilberforce* lays down the law expressly as we contend, and *Sanders v. Benson* is equally in our favor. Now looking at the case on principle, we say that an equitable assignment, accompanied by possession, creates the relation of landlord and tenant. The equitable assignment alone is, as regards the landlord, nothing, for it does not in any way bring the assignee into contact with him; but when possession is taken a person comes in whom the landlord, if he acquiesces in the taking possession, can not treat as

a stranger, and the assignment thus becomes perfected.

Again, whoever takes the land with notice of the covenants is bound by them: *Tulk v. Moxhay*, 2 Phill. 774.

The Lord Justice KNIGHT-BRUCE.—Would not a merely prohibitory covenant, like that in *Tulk v. Moxhay*, have been enforced against an under-lessee who had notice of it?

Mr. LLOYD, in reply.

Judgment reserved.

March 27. The Lord Justice KNIGHT-BRUCE.—The substantial question upon this appeal is whether an equitable assignee of a legal term of years granted in mines, or mines and other hereditaments, under a reserved rent and certain covenants, is liable to be sued in equity by the lessor for rent which became due and damages in respect of breaches of some of the covenants committed during the time that the assignee was in the possession and enjoyment of the demised property as the equitable assignee of it, which he has now ceased to be. There is not any special or any other special circumstance in the case that is, in my view, material. It was properly conceded, on the part of the respondents, that the liability would not have existed but for the possession or enjoyment of the property under the equitable assignment. It appears, however, to me, I acknowledge, that the possession and enjoyment make no difference. They do not, in my opinion, create a contract between the lessor and the equitable assignee which can give the former a title to the relief prayed against the latter. The possession by itself would not, nor would the equitable assignment by itself, have given the respondents the equitable right which they are here asserting against the appellants; neither, I think, can the union of the two. The legal right, if any, that the respondents have against the appellants ought, I conceive, if asserted in any court, to be so in a court of law. The absence of that legal right can not, in such a case as the present, confer in my opinion, an equitable right to what the bill asks against them. The demurrers seem to me sustainable, but I am not for giving any costs of the suit.

The Lord Justice TURNER, after shortly stating the allegations and the prayer of the bill, proceeded as follows:

In determining the case I think that no weight can be given to the allegation that the agreement, sale and assignment mentioned in the bill were frauds upon the plaintiffs. These were acts authorized by the law, and not in themselves fraudulent, and no circumstances are stated which can affect them with the character of fraud. That allegation, therefore, may be laid out of the case. The other allegations of the bill in substance amount to no more than this, that the demurring defendants have agreed to take and purchase interest in the colliery and other property demised by the lease, and that they have been in possession under the lease and have treated themselves as assignees of it and entitled to its benefits. The question raised by the demurrers is whether, under these circumstances, these defendants became liable in equity to the plaintiffs for the rent reserved by the lease and upon the covenants contained in it.

Looking at this question upon principle and without reference to the decided cases, I confess myself unable to discover any ground upon which these defendants can be subjected in equity to the liability which this bill seeks to impose upon them. If, as observed by my learned brother, these defendants are at law liable to the plaintiffs, the plaintiffs may pursue their legal remedies. The bill states no impediment to the pursuit of them, no obstruction for the removal of which the interference of this court can be required. If, on the other hand, these defendants are not at law liable to the plaintiffs, what are the grounds alleged by this bill upon which they are in equity to be made liable? Simply that they have contracted to purchase interests in the lease and have been in possession.

The contracts to purchase, however, are not contracts with the plaintiffs, and there is nothing in the bill to show that the plaintiffs are in any manner entitled to the benefit of those contracts, and if the defendants are liable by virtue of their possession, the liability, as I apprehend, is to be enforced at law and not in equity. Courts of equity do not, as I think, in ordinary cases, decree the payment of rent or the performance of covenants upon a mere agreement for a lease. In such cases the court does not treat the relation of landlord and tenant as completed by the agreement, and decree the rent to be paid and the covenants to be performed accordingly, but it

decrees the execution of the lease, and leaves the parties to their remedies at law consequent upon the relation created by the execution of it. To take, however, a case more near to the present, suppose, in the case of an agreement for a lease, the intended lessee has assigned the benefit of the contract; can this court, at the instance of the intended lessor, enforce the payment of the rent or the performance of the covenants by the assignee of the contract? I take it most clearly not, for there is no privity of contract between the lessor and the assignee; but if this can not be done where there is a mere contract for a lease, upon what principle is it to be done where there is an actual lease, and the lessee has agreed to assign?

These considerations seem to me to prove, if proof be wanted, that the relation of landlord and tenant is a legal and not an equitable relation; and this view of the case seems to me to introduce another and not unimportant consideration. Where persons enter into contracts, they must surely be assumed to contract with reference to the rights and liabilities incident to the subject-matter of the contract. Must not these defendants, therefore, when they agreed to take and purchase interests in this lease, be taken to have understood that, as between them and the landlord, they would not become liable until the lease was assigned to them? Can this court extend and alter their contract, and hold them to be so liable before the assignment is made? Upon these grounds I think that, upon principle, this bill can not be maintained.

It remains then to consider whether there is such a weight of authority in favor of the bill as renders it incumbent upon us to support it. I am of opinion that there is not. I think it unnecessary to consider the cases anterior to the decision in *Moore v. Choat*, for, so long as it was held that an equitable assignee of a lease by way of mortgage was liable in equity to the landlord for the rent and upon the covenants, it would not of course be held that an equitable assignee of the lease, otherwise than by way of mortgage, was not so liable, the case of the equitable mortgagee being of course entitled to the more favorable consideration. So long, therefore, as the court was governed by the cases of *Lucas v. Comerford*, 3 Bro. C. C. 166, and *Flight v. Bentley*, 7 Sim. 149, it might well be that the decision in a case like the present should be in

favor of the landlord. But the cases of *Lucas v. Comerford* and *Flight v. Bentley* were overruled, or at all events their authority was displaced by the case of *Moore v. Choat*, and all the subsequent cases have followed that decision with the single exception of *Sanders v. Benson*, 4 Beav. 350, and in that case the bill was dismissed on a different ground, so that the case has no authority beyond the weight which is justly due to the dicta which it contains. In the argument on the part of the plaintiffs it was said that these subsequent cases were cases of equitable mortgagees with the exception of *Walters v. The Northern Coal Co.*, 5 De G., M. & G. 629, which it was attempted to distinguish. It is impossible, however, to misunderstand the judgment of the lord chancellor in that case, and it can not, I think, be substantially distinguished from the case before us; and, as to the other cases being cases of equitable mortgagees, it does not seem to me that the distinction attempted to be drawn between the case of an equitable mortgagee, and of an equitable assignee otherwise than by way of mortgage, is well founded; for although the cases are different, the difference consists not in the relation of the lessor to the assignee, but in the relation of the assignor to the assignee.

The difference is that in the one case the assignee may be bound to indemnify the assignor, in the other not, and this difference being one which does not affect the relation between the lessor and the assignee, I do not see why the cases as to equitable mortgagees do not apply to cases like the present. My opinion, therefore, is, that both upon principle and authority these demurrers ought to be allowed, but I think they should be allowed without costs.

ROLLESTON V. NEW.

(4 Kay & Johnson, 640. High Court of Chancery, 1858.)

Where covenants are apparently variant, it is necessary to consider the whole instrument, to obtain the intent of the parties.

¹ Covenants to be construed together, and sweeping clauses controlled by the special. A lessee covenanted to leave at end of term, if lessor should require it, all the plant of the mine for the lessor, being paid for it at a valuation. By a subsequent clause he was allowed to remove the plant, unless lessor notified him of his intention to take it: *Held*, that the lessee was not bound to keep the machinery till the end of term, but might at any time give notice, and remove it, the landlord having the option, upon receiving such notice, to give a counter notice of his intention to take and pay for the plant.

A covenant to do nothing that would cause flooding of the mine, which the removal of its machinery would occasion, is not broken by the lessee removing such machinery under a clause allowing such removal. The lessor must protect himself by exercising his option of purchase.

By an indenture dated April, 1852, the plaintiff demised to the defendant Morley certain mines, veins and beds of coal, for a term of twenty-one years, at a fixed yearly rent per acre, for all coal got out or taken by the defendant, and it was agreed that if the whole of the coal thereby demised should, before the end or other sooner determination of the term, be worked out and paid for, and the covenants, clauses and agreements on the lessee's part should have been duly kept and performed, then the indenture should be void. The indenture contained the usual covenants for properly working the mine, and for the introduction of buildings, machinery, plant and other materials, and a covenant that the plant and all erections, machinery and other works, implements and things to be made and used in or about the premises, should be of good workmanship and materials, and of a modern character.

It contained also a covenant by the defendant Morley, that he would not, during the term, willfully or negligently do, or suffer to be done, any act or thing which might occasion or tend to produce the drowning of the mine or any loss of the coal in the beds thereby demised. And it then contained a

¹ *Fogus v. Ward*, 5 M. R. 1.

covenant "that the lessee, his executors, administrators and assigns, should, at the end or other sooner determination of the term thereby granted, if the lessor should require them so to do, leave for, or deliver, and permit and suffer him to receive, take and enjoy, for his own proper use, all and every the engine and other implements, plant, buildings, machinery, gearing, articles, things and materials, which should have been erected, put up or used in and about the working of the said colliery and coal mines, upon receiving twelve calendar months notice in writing from the lessor, and being paid for the same according to a valuation to be made by two indifferent persons, one to be chosen by the lessor and the other by the lessee, his executors, administrators or assigns, or by their umpire in case of disagreement." The indenture contained a proviso for re-entry by the lessor in the event of the lessee becoming insolvent; and it also contained a proviso and declaration, "that it should be lawful for the lessee, his executors, administrators and assigns, at any time or times during the said term or within the space of twelve calendar months next after the expiration or other sooner determination of the said term, to take down, carry away and remove all and every the buildings, machinery, steam engines, articles, things and materials, which had been theretofore erected, or which should or might at any time or times during the said term be erected or brought by the lessee, his executors, administrators or assigns, upon the said lands or grounds, unless the lessor should be minded or desirous to purchase the same, which he should have liberty to do, upon giving the notice thereinbefore mentioned, and upon paying such price or value for the same as should be estimated to be fair and reasonable by two indifferent persons to be appointed as therein mentioned, or by their umpire in case of disagreement."

In November, 1857, the defendant Morley assigned all his personal estate and effects (except the lease of the mines) to the defendants New and Handyside, upon trust for the benefit of his creditors.

In April, 1858, the trustees sent to the plaintiff a notice that they intended to remove all and every the buildings, machinery, steam engines, articles, things and materials,

erected or used in the mines by the defendant Morley, unless the plaintiff should be minded and desirous to purchase the same at such price or value as should be estimated to be fair and reasonable, as mentioned in the indenture of lease, and of such his mind and desire should forthwith give them notice in writing.

The plaintiff thereupon filed his bill, stating these facts and charging that the removal of the said plant, buildings and machinery, would cause great and irremedial injury and mischief to the mines, and would occasion or tend to produce the drowning of the mines contrary to the covenants in the lease contained, and that in order to prevent the mines from being drowned it was requisite that the water should be pumped out by means of the said machinery, as had hitherto been done.

The bill prayed for a declaration, that according to the true construction of the indenture of lease the defendants were not at liberty to sell or dispose of, or to remove the said plant, buildings, machinery, gearing, articles, things and materials from the mines, until the end or other sooner determination of the said term, nor until the plaintiff should have had the opportunity of exercising the option by the indenture reserved to him, whether or not to purchase the said plant and machinery, or any part thereof, according to the provisions of the indenture, and praying also for an injunction on that footing, and for a receiver.

The defendants demurred for want of equity.

Mr. JAMES, Q. C., and Mr. GIFFARD, in support of the demurrer, contended:

First. That according to the true construction of the lease the lessee was to be at liberty, at any time during the term, to remove everything he had brought upon the premises, unless the lessor should give notice of his intention to purchase, and should pay for the same, which the plaintiff had not done. The deed contained a proviso in so many terms to this effect, and with that proviso the preceding covenant, by which the lessee was bound to leave all the property in question upon the premises if the lessor required him, was not in conflict.

Secondly. That even if the covenant were to be construed

strictly, and without reference to the proviso which followed, the demurrer must be allowed, for such a covenant would be so injurious and oppressive to the lessee, that the court would never enforce it, and ought not to grant an injunction to prevent it from being broken: *Talbot v. Ford*, 13 Sim. 173; otherwise, throughout the entire term of twenty-one years, the lessee would not be able to remove a single tool he had once brought upon the premises.

THE VICE-CHANCELLOR.—The bill avers that there was an express covenant not to do any act which may tend to drown the mine.

MR. GIFFARD.—If the removal of the steam engines will have that effect, the plaintiff has the remedy in his own hands, for he can give notice to buy them. Besides, if he compels the lessee to leave the engines, he can not compel him to work them. The applications to the court consequent upon such an injunction would be endless: *South Wales Railway Co. v. Wythes*, 1 K. & J. 186.

MR. WILLCOCK, Q. C., and MR. DEGEX, in support of the bill.

According to the true construction of the deed all the property in question must be left in the mine, until the end or other sooner determination of the lease and will then be subject to the plaintiff's right to elect, as in the lease provided, whether he will purchase upon the terms expressed in the lease. Till then no notice need be given by the lessor. As to this the first covenant is absolute, and the subsequent clause, empowering the lessee to remove, must be read so as not to derogate from the rights of the lessor under the former. A contrary construction of the latter clause would result in extreme hardship to the lessor, by enabling the lessee to remove everything at any time within the term or within twelve months after its expiration, and to do so every year, if so disposed. On the other hand no hardship is imposed on the lessee by the construction for which the plaintiff contends. The lessee is not bound to retain, to the end of the lease, the identical engines and machinery, but may remove them, provided he replaces them by others equally good, or leaves on the premises such plant or materials as may be wanted for the due and proper working of the mine.

Effect must be given to every clause in the deed. The deed contains a covenant by the lessee not to do any act which may occasion or tend to produce the drowning of the mine. The removal of the steam engine will have that effect, and if so, the court ought not to put such a construction upon the clause empowering the lessee to remove, as will render the covenant against drowning the mine inoperative, by enabling the lessee to do that which he has expressly stipulated not to do. The court can restrain the breach of such a covenant in a deed, although it can not enforce performance of the entire instrument: *Rolfe v. Rolfe*, 15 Sim. 88.

A reply was not heard.

Vice-Chancellor, SIR W. PAGE WOOD.

This demurrer must be allowed. The case is fully stated in the bill, and the question between the parties is fairly raised by the demurrer.

The question is, what construction is to be put upon a lease containing certain covenants, of perhaps an unusual description, and appearing, at first sight, to be somewhat at variance with each other. To determine this question in the present case, as in every other, whether the instrument be a deed or a will, it is necessary to look at the whole instrument, and, giving due weight to each of the clauses which may appear to be in conflict, to consider what, upon the whole of the instrument, can be fairly collected to have been the intention of the parties. The lease in question is a lease for twenty-one years, of which fourteen are unexpired. It contains the usual covenants for properly working the mine, for the introduction of machinery, plant and other materials. It also contains a covenant not to do any act which may occasion or tend to produce the drowning of the mine; and then there is the following covenant with reference to the machinery:

(The vice-chancellor read the covenant by the lessee to leave the machinery and materials in question upon receiving twelve months' notice, and being paid as above mentioned.)

That is certainly a covenant of a very large and somewhat burthensome description, and it is natural to expect to find some other clause in the lease to protect the lessee from its full

effects. For the lessor is not bound to give notice until twelve calendar months before the expiration of the term (even if he is bound to do so then, having regard to a subsequent clause in the lease); and provided such notice should eventually be given, the effect of the first covenant is, that every single article which the lessee has introduced into the mine he is bound to keep there. He can not remove a single engine for the purpose of substituting a new one in its place. There is a covenant in another part of the deed, that all the machinery and things to be used shall be "of a modern character;" but no single article or thing once brought upon the premises can be removed, if that covenant is to be taken alone. A covenant of so comprehensive a character might expose the lessee to considerable inconvenience.

It was argued that this was not the case; that the covenant resembled, in effect, a covenant to keep up so many flocks of sheep, consistently with which individual sheep might be sold, provided the flocks were kept up and ultimately made good; and that so here, the lessee was not bound to retain to the end of the lease the identical engines and machinery, but might remove them, provided he replaced them by others equally good; or provided he left on the premises such machinery and plant as might be wanted for the due and proper working of the mine. Such a covenant would have been a much more reasonable one to insert, but it is not the covenant with which I have to deal; that covenant is to leave everything, and the identical things, originally introduced.

It being, therefore, natural to expect some other clause in the lease to protect the lessee from the injurious consequences of such a covenant, I find the following:

(His Honor read the proviso and declaration set out above.)

It was argued that the large power there given to the lessee to remove, at any time within the term or within twelve months after its expiration, all the things there specified, would be a hardship on the lessor; but that power (and this is the whole point of the case) is not absolute, but conditional. The lessee is only to have a power of removal in the event of the lessor not being minded to purchase, which he is to be at liberty to do upon giving notice and paying the price estimated.

Thus read, the two clauses are not inconsistent. Nothing

is specified as to the particular period when notice is to be given, but if the lessor is once minded, and once gives notice to purchase everything the lessee has brought upon the premises, everything so brought must be left for him by the lessee, the lessor paying for them, for that of course is implied. On the other hand, and to guard against a capricious use of that option in the lessor, if the lessee is minded to remove everything he has brought upon the premises, he may do so, unless such notice be given and payment made.

The necessity for some guard of this description is obvious for instance, by the terms of the lease, if all the coal should be worked out before the end of the term, and the covenants, clauses, and agreements in the lease should have been duly kept and performed, then the lease was to be void. But suppose the coal to be worked out before the end of the year, and the covenants not to have been kept, then the deed would continue in force. The coal might all be worked out several years before the expiration of the lease, and yet according to the plaintiff's contention, every article ever brought upon the premises by the lessee would have to remain there, useless and rotting, until the term expired.

Again, to take the case that has happened—and a better illustration, perhaps, can not be put—the lessee becomes insolvent, and has no means of working the mine. The lessor has provided for that event by reserving to himself the power of determining the lease. The lessor, therefore, is perfectly protected, for at this moment he may determine the lease and purchase all or any part of the property in question. But the lessee has no reciprocal power; he can not shake off his lease; and the plaintiff's contention is, that, notwithstanding the lessee is insolvent and can no longer work the mine, he, the plaintiff, is entitled to continue the lease, and to have it declared that for fourteen years all the property shall stand idle upon the premises for the benefit of no person whatever. To arrive at that construction it would be necessary to override the express provision in the lease, that it shall be lawful at any time for the lessee to remove the property, unless the lessor shall give notice to purchase.

It was argued that effect must be given to every clause in the deed; that the deed contains a covenant that the lessee

shall do no act which may occasion or tend to produce the drowning of the mine; that the bill avers (what may be easily conceived) that the removal of the steam engine will have that effect, and if so the court ought not to put such construction upon the clause empowering the lessee to remove certain articles, as will render the covenant against drowning the mine entirely inoperative, by enabling the lessee to do that which he has expressly stipulated not to do. That argument might be cogent if the lessor had no option of giving notice of his desire that the property should be left. But the lessor has expressly reserved to himself that option. It was right that the defendants should give notice of their intention to remove the property, in order that the landlord, if he pleased, might be able, by a counter notice, to stop their proceedings. But the correspondence shows that this course has been taken by the defendants; and that being so, and no counter notice having been given by the plaintiff of his election to purchase, the lessee was at liberty to remove the property. As regards the drowning of the mine, therefore, the landlord must be left to his remedy (if he has one) at law, by an action on the covenant. He has the power of stopping all the mischief which his bill seeks to prevent. He refuses to exercise that power; and it seems to me that it would be an unreasonable interpretation of the lease to hold that, in order to prevent the possible consequences of that refusal on his part, the property must be left as it is for the next fourteen years, notwithstanding the express stipulation that it shall be lawful for the lessee "at any time or times" to remove it. Those words are too strong to be cut down in order to give effect to such an interpretation.

The intention of the parties to the instrument, as I have gathered it, might have been expressed in a manner less circuitous and cumbrous; nevertheless it appears to me that it is sufficiently expressed, and that the construction I have adopted gives a rational meaning to the whole of the instrument. The demurrer, therefore, must be allowed.

Ordered accordingly.

DOE DEM A. J. PATTON ET AL. V. FELIX AXLEY ET AL.

(5 Jones L. 440. Supreme Court of North Carolina, 1858.)

¹ A deed granting the right to prospect and mine at a rent payable quarterly and running "so long as the party or successors may deem it proper to operate": *Held*, a lease from year to year requiring a six months' notice to quit before the lessors could terminate it.

Ejectment, tried before Dick, Judge, at the fall term, 1857, of Cherokee Superior Court.

The only question in this case was, whether, according to the proper construction of the deed offered in evidence by the plaintiffs, the estate thereby granted was an estate for years or an estate at will. It was agreed that if the deed passed an estate for years, the notice given was insufficient, and that the court should enter judgment of nonsuit, but if an estate at will, judgment should be rendered for the plaintiffs. The following is the deed in question:

"Know all men by these presents, that we, the undersigned, have entered into the following agreement: In the first place, A. J. Patton and G. F. Morris, on their part, have this day rented and leased unto F. F. Oram and Felix Axley a certain tract of land situated in Cherokee, North Carolina, in district No. 6, containing 170 acres of land, more or less, for the purpose of examining for minerals. The said Oram and Axley are to have the right to enter into the peaceable possession of the said land, and to carry on any operations they may deem proper and right, to develop whatever minerals the land may contain, with all the rights and privileges that may be necessary to carry on the said mining operations.

"In consideration of the above grant of the right of the said land, the said Oram and Axley agree to pay to the said Patton and Morris the one twentieth part of whatever minerals may be found on the said land, after the ore is dressed and

¹ This expression is not noticed either in the original syllabus nor in the opinion. The idea of its being a perpetual lease was not suggested.

ready for market, to be delivered at the said mine, with the exception of iron ore, for which the said Oram and Axley agree to pay the said Patton and Morris, at the rate of 12½ cents for every 2,240 pounds of iron ore they may use. The payments hereby provided for are to be made at the end of each and every quarter. It is, however, understood, that in case the said operation is abandoned at any time, for the space of one year, it is to operate as a forfeiture of all the rights hereby conveyed. The said lease and rights hereby given and granted, are continued so long as the party or successors may deem it proper to operate."

Signed and sealed by plaintiffs and defendants.

His Honor being of opinion with the plaintiff, upon the case agreed, gave judgment accordingly, from which the defendants appealed to this court.

GAITHER, for the plaintiffs.

J. W. WOODFIN and COLEMAN, for the defendants.

PEARSON, J.

This case turns upon the construction of the deed, which is set out as a part of the record.

His Honor was of opinion that its legal effect is to create a tenancy at will. We are of opinion that its legal effect is to create a *tenancy from year to year*, and consequently the notice given was not sufficient; for, to determine an estate from year to year, *six months'* notice, either on the part of the lessor or of the tenant, *before the expiration of the current year, that at that time* the estate will be considered as terminated, is necessary. This is familiar learning in the text books.

We arrive at the opinion that the deed creates a tenancy from year to year, from a consideration of the purpose for which the lease was made; that the rent reserved is payable quarterly; that a condition is annexed whereby the term is to be forfeited by a non-user for one year, on the part of the lessors, who were to work the mine; that they have, at any time, the right to discontinue the operation of the mine, and that the formality of a *deed* would hardly have been thought

necessary if only a tenancy at will was to be created which could be terminated at any time upon reasonable notice: *Kitchen v. Pridgen*, 3 Jones' Rep. 49.

PER CURIAM.—*Judgment reversed, and judgment of nonsuit, according to the case agreed.*

MOYERS ET AL. V. TILEY.

(32 Pennsylvania State, 267. Supreme Court, 1853.)

²Lease construed with reference to forfeiture clauses. The lease of a coal bank provided that the lessee should put the same in good working order for the rent of the first year and thereafter pay a royalty on every bushel of coal taken from the bank; and that if the said coal bank should stand idle by the act of the lessee when it would yield coal for the term of one year it should be taken as an abandonment of the lease: *Held*, that this clause of forfeiture had no reference to the first year of the term and that the remedy of the lessor for violation of the covenant to put the bank in order that year, was by his action for damages only.

Error to the Common Pleas of Cambria County.

This was an ejectment by Michael Moyers and Elizabeth Moyers against William Tiley for a tract of 200 acres of land in Washington township. The case was formerly in this court and was reported in 1 Casey, 397.

In 1852 the plaintiffs being the owners of the land in controversy, leased the same to the defendant, Tiley, by the following instrument:

"Agreement made this 29th day of January, 1852, by and between Jacob Moyers and Elizabeth Moyers (of Adam Moyers, deceased), of Washington township, Cambria county, of the first part, and William Tiley Sr., of Huntingdon county, of the second part, witnesseth that for and in consideration of the covenants and agreements hereinafter contained, the said Moyers of the first part doth agree to grant, lease and demise unto the said Tiley, their coal bank, and the appurtenances

¹ *Tiley v. Moyers*, 4 M. R. 320.

² *Vanatta v. Brewer*, 6 M. R. 358.

thereunto belonging, together with the privilege of timber for the use of coal bank, for and during the term and space of ten years from the first day of March, 1852, and to continue until fully complete and ended. In consideration of which, the said William Tiley, Sr., doth bind himself well and truly to put the said coal bank in good working order, for the rent of the first year, and to pay the second and third year, one quarter of a cent per bushel, for each and every bushel of coal taken from the said bank; and for the remaining seven years one half cent per bushel, for each and every bushel taken, payment to be made quarterly. It is further agreed that the said Tiley is to have the privilege of a right of way for a more direct railway, provided it does not interfere with any other buildings on the land of the said Moyers, together with the privilege of building one or more houses or shops for the use of said bank, and to occupy them for the term of this lease, free of rent and to leave them in good order; the buildings to be substantial. It is mutually agreed that if the said coal bank should stand, by the act of said Tiley, when it would yield coal, for the term of one year, it is to be taken as an abandonment of the lease, and to be treated accordingly. It is further agreed that the said Tiley is to leave the bank in good working order; and the main gangway to be left open, or in such order so as not to interfere with the taking out of coal, on the expiration of this lease. No other persons are to have the privilege of taking coal from said bank, without the consent of said Tiley first had or obtained in writing."

At the time of the execution of this lease, there were two open drifts on the land leading to the coal vein, which were in such a state of dilapidation as to require the construction of new ones, or the reparation of the old at a great expense. Tiley, the lessee, did not repair these drifts, nor did he take any coal from the bank during the first year of the term; but in the second year he purchased an adjoining piece of land, upon which two drifts were opened, one of which communicated with the drifts on the demised premises, and by this avenue he obtained access to the coal on the plaintiffs' tract, and thence continued to mine the coal, as well on his own land, as on the demised premises.

On the trial, the plaintiffs' counsel requested the court to

charge the jury: That if they believed from the evidence, that the coal bank leased by the defendant, William Tiley, was suffered by him to remain any one year during the lease, without taking coal out of said coal bank, there was an abandonment of the lease, and the plaintiffs are entitled to recover.

The court below (TAYLOR, P. J.), refused so to charge the jury; and added: "We think it very plain that such is not the meaning of this part of the lease; we instruct you explicitly, that, according to the true meaning of the parties to this agreement, and the true construction of it, the lease should not be considered abandoned, unless there should appear to have been no coal mined through any entry in consequence of the act or fault of Tiley, between the 1st of March, 1853, and the 1st of March, 1854. If there was any coal mined on the Moyers' land by Tiley within that year, the plaintiffs can not recover in this action, and the verdict must be for the defendant."

To this the plaintiffs excepted, and a verdict and judgment having been rendered for the defendant, they removed the cause to this court, and here assigned the same for error.

WHITE & COFFEY, for plaintiffs in error.

MILES, for the defendant in error.

The opinion of the court was delivered by CHURCH, J.

The question in this cause arises upon the construction of the lease. The plaintiffs claim that if defendant suffered the coal bank to remain any one year during the term without taking coal out of it, his rights under the lease became forfeited to them. The clause in the instrument upon which this forfeiture is set up is in the following words: "It is mutually agreed, that if the said coal bank should stand, by the act of said Tiley, when it would yield coal, for the term of one year, it is to be taken as an abandonment of the lease, and to be treated accordingly." It is very clear from the language, "when it would yield coal," that it was contemplated by the parties there might be during the term a period of at

least a year when the bank would not yield coal. This clause of forfeiture is inserted wholly for the benefit and protection of the plaintiffs. And the stipulation that putting the bank in good working order should answer for the rent of the first year was apparently intended for the advantage of the defendant. If the latter put the bank in good working order and took out no coal, it necessarily saved the coal so much for mining in subsequent years, when it would yield a rent to plaintiffs, instead of which having it taken when yielding no rent to them, it might result greatly to their disadvantage. This view is sustained by the provision, that for the next two succeeding years the rent should only be half the sum per bushel of that required to be paid for the last seven years of the term. It would therefore be an unwarranted presumption to suppose or infer that the parties intended to bind the lessee by contract to perform that which was so obviously, under any view of the evidence, to result most to his advantage and the probable disadvantage of the lessors, upon the pain of forfeiture to the latter of all his rights with his contemplated improvements and expenditures, under the terms of the lease. There could have been no such incentive required. These are not the circumstances and motives which induce the introduction of clauses of forfeiture in deeds. It seems preposterous, therefore, to construe this one as contended for by plaintiffs. If there has been any breach of covenant by the lessee, in not putting the bank in good working order during the first year, the only remedy is undoubtedly in damages as indicated by this court, when the cause was here before: 1 Casey, 397. The true and common sense interpretation of this clause of the lease was given in the able charge of the learned judge who tried the cause below. Due consideration given to the commentator's definition of title by forfeiture fully sustains the view we have taken. It is, he says, a sort of punishment annexed by law or contract, to some act or negligence in the owner, whereby he loses all his right and interest, and they go to the party injured as a recompense for the wrong he has sustained. There is in this case no injury or wrong to plaintiffs shown, and none can reasonably be implied from the terms of the lease. Forfeitures are odious in law, not to be favored, and never adjudged,

except when required by a plain and clear interpretation of the contract, and also promptly demanded, without any symptoms of *laches* or acquiescence. That is surely not the case here.

We perceive no error in the ruling of the Common Pleas on the question, and the judgment must be affirmed.

Judgment affirmed.

BRAINERD V. ARNOLD ET. AL.

(27 Connecticut, 617. Supreme Court of Errors, 1853.)

¹ Lessee for royalty, bound to work. When a lease of land including quarries has been granted, the only rental being a royalty on the amount of stone quarried, it is not optional with the lessees to work the quarry or not; they are under obligations to improve the quarries in a reasonable manner during the term.

Necessity of mistake to be mutual. Lessees supposed they were getting under their lease the exclusive right to the premises for all purposes. Lessors signed under the belief that it gave the right to quarry only: *Held*, no ground for correction by a court of equity, the mistake not being mutual.

² Mistake no ground for cancellation. Where mistake in the terms of a contract has occurred, it is no ground to annul the entire contract but for reforming it according to the truth.

Lessee not taking benefit of mistake. Equity will not reform on account of mistake where a lessee is not seeking to take advantage of the mistake and has not on request refused to allow it to be corrected.

No reform, to insert useless covenants. A lease will not be reformed by inserting a clause against cutting timber, where such cutting has not been attempted by the lessee and would be in violation of statute if attempted.

Fraud not charged in his complaint will not avail a plaintiff.

Fraud, dependent on construction of the consideration clause. A lease provided, for its sole rental, a royalty on the stone quarried. The "Committee" found that it was a case of constructive fraud if the true construction was that the tenant could have the occupation while under no obligation to work the quarries: *Held*, that the fraud being found to be hypothetical, depending on the construction of the contract, compelled the court to construe the contract upon that point, and they found that the tenant was under obligation to work, *ut supra*.

¹ *Watson v. O'Hern*, 8 M. R. 333.

² *Hartford Co. v. Miller*, 3 M. R. 333.

Bill in equity.

The plaintiff, on the 19th day of February, 1853, had leased to Samuel Arnold, 2d, and Isaac Arnold, two of the defendants, a tract of land of about thirty acres, owned by him, in the town of Middletown, on which was a stone quarry. The lease, after describing the premises, proceeding as follows:

"Together with the quarry or quarries thereon, and the privilege of getting out stone in the same; also the privilege of getting out stone in any part of said piece of land, and to use and occupy said land in any manner they may choose, and for all the purposes necessary and convenient for carrying on the quarrying business for the term of twenty years from the first day of April, 1853; to have and to hold said premises during said term of twenty years, to them, the said Arnolds, their heirs and assigns, to their own proper use and behoof; so that neither I, the said Brainerd, nor my heirs, nor any other person in my name or behalf, shall or will, during the term aforesaid, occupy or claim said premises, or any part thereof; the said Arnolds paying the said Brainerd seven per cent. on the price of all the stone they may quarry or get out on said land and sell—the percentage to be reckoned on the value of the stone when quarried and unhewed or in the rough, payment to be made in a reasonable time after the sale of and payment for said stone, and not before. The said Arnolds are to have the use of my wharf and land, on the west side of Connecticut river (describing it), for the term of twenty years aforesaid, for the purpose of putting stone on, to be hewed and shipped therefrom, together with the right and privilege to build up and repair said wharf, as from time to time may be necessary." The lease had been duly recorded in the town records of Middletown, and on the 9th day of June, 1856, the Arnolds had conveyed all their interest in the premises to David C. Burr, the other respondent, who had mortgaged the same back to them. Burr shortly after brought an action of ejectment against one Spencer, a tenant of a portion of the premises under Brainerd, in which action he recovered judgment. The case was afterward carried to the Supreme Court, and is reported in the 26th of Conn. Reps., p. 159. The present bill alleged that the negotiations between the plaintiff and

the Arnolds for the leasing of the premises, had reference solely to the leasing of the right to quarry stone upon the same, and that the Arnolds, to whom the plaintiff had left the preparing of the lease, had fraudulently drawn it in the form in which it was executed, so as to secure the exclusive possession of the whole tract, and had imposed it upon the plaintiff, who was ignorant of the forms and effect of such instruments, and that the Arnolds now claimed that the same gave them an exclusive enjoyment of the premises for all purposes for the term of the lease—that a part of the premises was land used for farming purposes and important as such to the plaintiff, but of no importance for quarrying purposes—and that the plaintiff in leasing the quarry had expected to derive large profits from the percentage to be paid him by the Arnolds, which was the only form in which rent was paid for the use of the land; but that the Arnolds, before the conveyance to Burr, and, since the conveyance, the latter, had almost wholly neglected to work the quarries, so that a very inconsiderable and inadequate sum had been received by him, and prayed that the lease be canceled, and the defendants required to release the premises to him, or that it be corrected so as to limit the right conveyed by it to that of quarrying alone, and that the defendants be enjoined from cutting certain timber growing on the premises, which it was alleged that they claimed the right under the lease to cut. The bill was dated July 31, 1857.

The case was referred to a committee, who found that the lease was drawn in accordance with the intentions of the parties, in all respects except as to the extent of the occupation which the lessees were to have during the term, as to which it was found that there was no agreement, as a matter on which their minds actually met, except that the lessees were to have the exclusive occupancy so far as the same should be necessary for the purpose of quarrying stone on the land demised; that the plaintiff did not know or suspect that he was conveying any more extensive right than this, while the lessees intended to have, and understood that they were to have, the exclusive occupation of the premises during the term. The committee also found that the plaintiff was a man of dull apprehension and extremely ignorant of the forms of transacting business, especially by writings, and that the Arnolds

were men of intelligence and well acquainted with the ordinary forms of doing business; that when proposing to draw the lease themselves the Arnolds stated to the plaintiff that they were acquainted with the forms of drawing leases for quarrying purposes in Haddam, where the Arnolds resided; and that the lease as drawn contained provisions with regard to the exclusive possession of the premises not usually inserted in the Haddam leases referred to. The committee found, however, no positive evidence of actual fraud, but reported that if the court should be of opinion that by the true construction of the lease the lessees were to have the exclusive occupation of the premises during the whole term, and were under no legal obligation to work the quarry at all, but were to work it or not at their discretion, there was a gross inadequacy of consideration for the lease, and from this and the inequality of capacity between the parties, he found that there was constructive fraud on the part of the defendants in procuring the lease from the plaintiff; and that, if such was not the legal construction of the lease, he did not find such fraud. It was further found that the defendants disclaimed all right to cut the timber growing on the premises except for quarrying purposes, and that they had not unreasonably neglected to work the quarries; also that Burr, at the time of taking his conveyance, had no notice of any agreement between the plaintiff and the Arnolds different from that expressed by the lease.

On the facts thus found the case was reserved for the advice of this court.

CHAPMAN and CLARK, for the plaintiff.

1. The report shows actual fraud on the part of the Arnolds. Their relation to the plaintiff was a confidential one. They had solicited the privilege of drafting the lease and he had intrusted it to them: 2 Swift Dig. 54; *Miller v. Wells*, 23 Conn. 21, 33; 1 Sto. Eq. Jur., §§ 217, 218. They withheld from the plaintiff an explanation, which in the circumstances they were bound to have made, of the peculiar character of the lease and of its effect, which they fully understood: 1 Sto. Eq. Jur. §§ 308, 309, *Story v. Norwich R. R.*,

24 Conn. 94, 113; Roberts on Frauds, 129. The plaintiff was a weak minded man, not conversant with the forms of business. The Arnolds took a fraudulent advantage of his condition in this respect: 2 Swift Dig. 63, 64; 1 Powell on Cont 31; 2 Id. 158; 1 Story Eq. Jur. § 242.

2. The inadequacy of consideration, taken in connection with the other circumstances, amounts to constructive fraud. On the facts stated by the committee and from which the committee has contingently found fraud, the court should find fraud: 1 Sto. Eq. Jur., § 246; Newland on Cont., 358; 2 Powell on Cont., 151, 157.

3. The minds of the parties never met on this contract, at least so far as the point in controversy is concerned. Hence, no legal obligation grows out of the contract: 1 Powell on Cont., 9.

TYLER and CULVER, for the defendants.

1. There can be no relief on the ground of actual fraud, for it is found that none existed.

2. Nor on the ground of mistake, since the mistake was not mutual, and therefore there would be no actual agreement to correct the written one by. If the plaintiff never agreed to the terms of the contract as drawn, the Arnolds equally never agreed to it as he now seeks to make it: 2 Swift Dig., 56. It would be intolerable if a contract could be set aside, or a title broken up, merely because, in the absence of all fraud or misrepresentation, one party understood the written contract incorrectly. So far as the timber is concerned, it is expressly found that we disclaim all right to take it except for quarrying purposes. It would be waste to cut it for any other purpose: Rev. Stat., tit. 1, § 284.

3. Nor on the ground of constructive fraud. This fraud is found by the committee only in case the court shall be of opinion that the lessees were not bound to quarry stone under the lease. It is clear that they are so bound. They hire the quarry on shares. The rent is payable only by a share of the profits. There is a clear implied agreement to work the quarries to a reasonable extent. If it were not so, yet the court can not grant relief on the ground of such constructive fraud,

because the bill does not allege it, and the decree must follow the bill: Sto. Eq. Pl., § 257; *Gaylord v. Couch*, 5 Day, 223; *Skinner v. Bailey*, 7 Conn. 496; *Crocket v. Lee*, 7 Wheat. 522; *Carneal v. Banks*, 10 Id. 181; *Piatt v. Vattier*, 9 Pet. 405; *Knox v. Smith*, 4 How. 298.

4. At any rate the court will not grant the relief against the defendant Burr, who is a *bona fide* purchaser for a valuable consideration, without notice of any equity in favor of the plaintiff. He has the legal title, and an equal equity, and therefore stands better than the plaintiff: 1 Sto. Eq. Jur., § 57a.

STORRS, C. J.

We are of the opinion that on the facts found by the committee in this case, in connection with the allegations of the bill, the plaintiff is not entitled to relief against any of the defendants. He prays for a cancellation of the lease set out in the bill, and a release to him by the defendants of all their right and title in the leased premises, or that the lease may be corrected so as to be limited to the purpose of quarrying only, and that the defendants may be enjoined to work the quarries in the demised premises in a judicious and proper manner, with such efficiency that the plaintiff may, during the continuance of the lease, receive annually a reasonable rent for the use of said quarries, and that they may also be enjoined against cutting or carrying away any of the wood and timber growing upon said premises, and from doing any act inconsistent with the true meaning of said lease so to be corrected.

It appears that more than three years after the lease was executed and recorded, the defendants, Samuel and Isaac Arnold, conveyed all their interest in the demised premises to the other defendant, Burr. If that is to be deemed a conveyance for a valuable consideration paid by the latter, and without notice on his part of the facts which are claimed by the plaintiff to entitle him to relief, we are clearly of the opinion that as against Burr no such relief can be granted, on the ground that he has the legal title, and at least an equal equity with the plaintiff, which, by a familiar rule of equity, must prevail over the merely equitable title of the plaintiff. The allega-

tions of the bill on this subject, and consequently the finding of the committee which conforms to those allegations, are perhaps too general to justify us in the conclusion, either that a valuable consideration was paid by Burr for that conveyance, or that he had no notice of the facts relied on by the plaintiff. Although it was not questioned on the argument, but assumed by the counsel on both sides, that he paid such a consideration, and had no such notice, neither of these facts is either alleged or denied in the bill. There is apparently no particular answer filed in the case, and consequently the hearing must be deemed to have been had upon a general denial of the facts stated in the bill; and such a denial would not embrace an averment of the payment by Burr of a valuable consideration or of a want of notice. The bill states that, on the day of the conveyance to him, he mortgaged the premises to the Arnolds to secure the payment of three thousand dollars and interest thereon, and the committee finds that the latter transferred their interest in the premises to Burr, and that he mortgaged the same back to them at the time and in the manner set forth in the bill, and that Burr, at the time of receiving said transfer, had no notice of any other or different agreement between the Arnolds and the petitioner than that set forth in the lease. If Burr, at the time of the assignment to him, only mortgaged back the premises for the whole consideration of it, or if he paid only a part of the consideration and mortgaged them back to secure the residue, he would not, in the first case, stand in the situation of a purchaser for a valuable consideration, having paid no money, or in the latter case, of a purchaser to any greater extent than the amount which he then actually paid; and it would seem to be the fair import of the finding, that such mortgage was given for the security of the whole, or a part of such consideration. In regard to the finding on the subject of notice to him, it is to be regarded or not by us, as the fact of such notice is or is not to be deemed by us to be fairly in issue on the pleadings in the case. Those pleadings are so loose and indefinite that we are strongly inclined to think that the decision of the case should not be placed on the ground that Burr was a purchaser without notice. And we are the more inclined not to do so, because we are satisfied that, were this a case only between the original par-

ties to the lease, the plaintiff is not entitled to any relief.

As the fraud or mistake complained of by the plaintiff did not take place in the original making of the contract which was afterward professed to be reduced to writing by the instrument of lease, but only in the expression of the terms of the contract as embodied in that instrument, the plaintiff clearly is not entitled to an entire cancellation of the lease, or a release from the Arnolds of their right and title to the leased premises. The most that the plaintiff can claim is, not that the real contract shall be annulled, but that the instrument embodying it shall be corrected so as to express truly such real contract. The first particular in which the bill alleges that the lease in this case did not conform to the real agreement between the parties is, that the lease gives to the Arnolds the absolute right, during the term, to the exclusive possession or occupation of the premises described in it, and not the right merely of getting out or quarrying the stone on those premises. We did indeed decide, in *Burr v. Spencer*, 26 Conn. 159, that the terms of the lease now in question do not restrict the lessees to the right of occupying the premises for the sole purpose of getting out and quarrying the stone in the land. But in the present case it is not found that they have ever used, or claimed or intend to use, the land for any other than that purpose, nor does it appear that they have ever been requested by the plaintiff or refused to make any correction of the lease. And under these circumstances we have held that a court of equity will not, without any necessity, in the exercise of the discretion by which they will be governed in such cases, interpose in the manner here claimed: *Thompsonville Scale Co. v. Osgood*, 26 Conn. 16. It is furthermore decisive on this point, that it is not found that there was any mutual mistake between the parties in regard to the extent or character of the occupation which the lessees were designed to have of the leased premises. Without such mistake the plaintiff can not claim to have the lease corrected, for, if it were made to conform to his own exclusive understanding as to its terms, it would obviously vary from that of the other party, and therefore would not correspond with the agreement between them, or, in other words, with any matter upon which their minds actually met. This,

of course, would be, not a correction of an agreement, but a substitution of a new one. On this ground the plaintiff is precluded from the right to have the lease corrected in this particular. For it is also found that, although the plaintiff, when he executed the lease, did not know or suspect that he was conveying any greater right or privilege than the occupancy of the land so far as it should be necessary for the purpose of quarrying the stone in it, the lessees intended to have, and understood that they were to have, the exclusive right of occupying it unrestrictedly during the term. To the claim that the lease should be corrected so that the lessees and their assigns should be expressly restricted from cutting or carrying away from the land the timber and wood growing or standing upon it, it is a sufficient answer in the first place, that it is neither alleged in the bill, nor found by the committee, that such a restriction was any part of the original agreement. But, in the second place, if it was, such an express restriction would be wholly unnecessary in order to prevent the commission of those acts, and would therefore be superfluous; for it is provided by the 284th section of the act for the regulation of civil actions (Rev. Stat., tit. 1), that "every person who, having no greater interest in real estate than an estate for years, or for life, created by the act of the parties and not by the act of the law, shall commit waste upon the premises, beyond what tenants for years or life, created by operation of law, may do, shall be liable to the party injured in an action on the case, unless he is expressly authorized by the contract under which such interest is created to do the acts complained of." As we have no doubt that under this statute the lessees of the plaintiff and their assigns would be liable, as they would clearly be if their estate had been created by operation of law, for cutting or carrying away the timber and wood growing upon the land demised, it is quite unnecessary that there should be any reformation of the lease in this respect. If any such waste should be meditated it would now be a proper ground for an injunction. It is not, however, alleged in the bill that the lessees have ever committed or meditated such waste. Indeed, it is stated that they have never claimed the right to do so; and, in regard to the defendant Burr, the allegation in the bill that he has done or threatened such

waste is expressly negatived. It is also found that all the respondents have disclaimed any right to cut or use the wood on the premises except for quarry purposes, and for those purposes their right to do so has not been questioned. This constitutes a decisive answer against the claim for a correction of the lease, and the granting of an injunction in regard to said wood and timber. It is, however, claimed by the plaintiff that he was induced to enter into the contract by the fraud of the lessees. It would be sufficient to say that no fraud, as it respects the making of the contract, is alleged in the bill. All the averments of fraud in it respect only the reducing of the contract to writing, and, as already remarked, the latter kind of fraud would be a ground only for the correction of the instrument, and not its cancellation. As therefore the bill does not state any fraud which would justify the annulling of the contract, the finding in regard to such fraud, if it would otherwise be sufficient for that purpose, should be rejected, as it is not founded on any allegations in the bill. If, however, such were not the case, we think that the report of the committee discloses no fraud, either actual or constructive, for which the lease should be annulled. All actual fraud is negatived. In regard to constructive fraud, the committee finds that there was such fraud on the part of the lessees in procuring the lease from the plaintiff, if, by the true construction of the lease, the lessees were to have the exclusive occupation of the leased premises, and were under no legal obligation to work the quarries in it at all; but were at liberty to work them or not at their option. And they report that they find such constructive fraud, in that case, from the fact that there would be a gross inadequacy of consideration for the lease, and from the relative inequality of capacity between the plaintiff and the lessees. It is generally the province of a committee to present the facts upon which the court are to decide whether fraud is constructively to be inferred, rather than to find whether such fraud exists. But, as the fraud is here found hypothetically only on the facts presented, it becomes necessary for us to decide whether, by the true construction of this lease, the lessees were bound to work the quarries, or had a discretion on the subject. We are of the opinion that, as the rent reserved in the lease was a certain

fixed proportion of the price of the stone which the lessees might get out of the land and sell, to be paid to the lessor in a reasonable time after it should be sold and paid for, the lessees were under an obligation to improve the quarries in a reasonable manner during the term of the lease. The case is analogous to the letting of land upon shares, as it is termed, where it would hardly be claimed that it is optional with the lessee whether he will cultivate the land or not. The very nature of the contract in these cases implies that the property leased is to be cultivated for the mutual benefit of the lessor and lessee. This being the case, there was no constructive fraud on the part of the lessees according to the finding of the committee. It is further found that the Arnolds, while in the occupation of the premises, did not unreasonably neglect to work the quarries, and the allegation in the bill that Burr, the other defendant, has been guilty of neglect in that respect is also found untrue. We therefore see no ground or occasion for the injunction prayed for in regard to the working of the quarries.

We therefore advise that the petition be dismissed.

In this opinion the other judges concurred.

Bill dismissed.

SHAW ET AL. V. STENTON.

(2 H. & N. 858. Court of Exchequer, 1858.)

¹ **Covenant for lessees' quiet enjoyment. Lessor working mine above to the destruction of the demised mine.** By indenture the defendant demised to the plaintiff a coal mine for a term of years, and covenanted that the lessees should hold and enjoy the mine during the term without any molestation, interruption or disturbance whatever, of, from or by the defendant. Afterward the lessor opened a quarry of ironstone, on lands lying over the coal mine, and in the working of such quarry made holes from the strata of ironstone into the demised mine, and caused parts of its roof to fall in and the mine to be flooded, and the working of the coal rendered impracticable: *Held*, that the defendant had a right to excavate the quarry, yet as the excavation had caused an interruption of the plaintiff's occupation of the demised mine, the defendant was liable for a breach of his covenant for quiet enjoyment.

¹ *Owens v. Wight*, 1 West C. R. 541.

This was a special case, stated under the 5th section of the Common Law Procedure Act, 1854, by an arbitrator to whom all the matters in dispute in the action were referred by order of a judge, made by consent.

The declaration stated that by an indenture made the 1st November, A. D. 1844, between the defendant and one William Stenton, since deceased, of the one part, and George Shaw, of the other part, the defendant and W. Stenton did demise, lease, etc., unto G. Shaw, his executors, etc., all that mine, vein, bed or seam of coal of them, the defendant and W. Stenton (describing it), together with free liberty, power, and authority for G. Shaw, his executors, etc., from time to time, and at all times thereafter, to make, dig, open and sink such pit or pits, shaft or shafts, etc., as they might think necessary and requisite for the obtaining, etc., the said mine, bed, vein or seam of coal, etc.; *habendum*, for the term of twenty-five years, at certain rents thereby reserved. And the defendant and W. Stenton, for themselves, their heirs, executors and administrators, did covenant, etc., with G. Shaw, his executors, etc. (*inter alia*), that G. Shaw, his executors, etc., "should and might peaceably and quietly have, hold, occupy, possess and enjoy, all and singular the said mine, bed, vein or seam of coal, etc., for and during the said term of twenty-five years thereby granted, without any let, suit, trouble, molestation, interruption or disturbance whatever, of, from or by them, the defendant and W. Stenton, their heirs, executors, etc., or any of them or any other person or persons whomsoever claiming or to claim, by, from, through, under or in trust for them or either of them. Averments: that W. Stenton made his will, and being seized of an undivided moiety of the reversion of and in the demised mine, devised the same to certain trustees; that W. Stenton afterward died; that by an indenture made after his death, G. Shaw assigned to the plaintiffs all his interest in the demised premises for the residue of the term, and that the plaintiffs entered. Breaches: that the defendants excavated certain mines of ironstone lying above the demised mine and made divers holes through the mines of ironstone into the demised premises and thereby caused large quantities of water to flow

into the demised premises, by means of which the roof of the demised mine was cracked and injured, etc. The declaration concluded with a claim by the plaintiffs of a writ of injunction to enjoin the defendant from further troubling, molesting or disturbing them in the manner aforesaid in their possession and enjoyment of their said mine and premises.

Pleas: First, that the defendant did not commit the breaches alleged in the declaration, or any part thereof. Secondly, as to the claim for an injunction: that the defendant doth not, nor did, continue to trouble, molest or disturb the plaintiffs as alleged. Issues thereon.

The arbitrator, by his award, found (so far as material to the present question) as follows: I find that the defendant, after the making of the indenture of assignment, did excavate, quarry, work and remove certain mines, beds and strata of ironstone lying within and under some of the several closes, inclosures or parcels of land, within and under which the mine, vein, bed or seam of coal demised by the indenture of lease of the 1st November, 1844, was situate; but above the said demised mine, bed, vein or seam of coal, that is to say, between the surface of the soil of the said closes, inclosures or parcels of land and the said demised mine, bed, vein or seam of coal; and also bored and made certain holes from, through and out of the said mines, beds and strata of ironstone, down to and into the said demised mine, bed, vein or seam of coal, and thereby caused certain quantities of water to percolate and flow down to and into the said demised mine, bed, vein or seam of coal, and to lodge there. And I do also find that by his so excavating, etc., the said mines, etc., of ironstone, the defendant caused parts of the roof of the said demised mine to be, and the same were, crushed, cracked, weakened and injured, and fell in; that I do find, etc., that by reason of such excavating, etc., by the defendant, of the said mines, etc., of ironstone, and the boring and making by the defendant, of the said holes, the said mine of coal became and was flooded, and the plaintiffs were prevented and hindered from working and mining their said mine, etc., of coal, and from getting and removing coals therefrom, and that the working and mining of the coal in parts thereof became and was rendered impracticable. And I do find and award, etc., that the

holes which the defendant bored and made from, through and out of the said mines, etc., of ironstone, down to and into the said demised mine, etc., of coal, were bored by him for the purpose of conveying, and the same did convey, water from his mines of ironstone into the coal mines of the plaintiff demised by the said indenture of lease; and that the plaintiffs have, by the making of such holes by the defendant, sustained damage to the extent of £100. And I do find, award, etc., that the said excavating, etc., of the said mines, etc., of ironstone so excavated, etc., by the defendant, as hereinbefore is stated, was (with the exception of the boring by him of the said holes) done in a workmanlike manner, but that the plaintiffs have thereby (in addition to the damages of £100 caused to them by making of the said holes) sustained damages to the extent of £509 4s. 10d. The arbitrator then proceeded to award, that in the event of the court being of opinion that the defendant had a right to excavate, etc., the said mines, etc., of ironstone, but that he had no right to make the said holes, and that the plaintiffs are entitled to recover damages for the making of the said holes, then I do award, etc., that the defendant shall pay to the plaintiffs the sum of £100; and in the event of the court being of opinion that the defendant had no right either to excavate, etc., the said mines, etc., of ironstone, or to make the said holes, and that the plaintiffs are entitled to recover damages for such excavating, etc., and also for the making the said holes, then I do award, etc., that the defendant shall pay to the plaintiff (in lieu of the said sum of £100) the sum of £609, 4s. 11d. The arbitrator then proceeded to find that the defendant, at the time of bringing the action, continued to disturb the plaintiffs as in the declaration alleged; and that the plaintiffs would be unable to work their mine of coal with the same advantage and profit, if the defendant should work the mines of ironstone within sixty-six yards of those parts of the closes under which the mine of coal might remain ungotten, as they would do were the mines of ironstone unworked; but that the mines of ironstone might, without disadvantage or loss of profit to the plaintiffs, be excavated at a distance of sixty-six yards, and that if the court should be of opinion that

the excavating the mines of ironstone is a breach of the covenant in the lease of the 1st November, 1844, then that a writ of injunction should issue.

J. ADDISON, for the plaintiffs.—The question is, whether a covenant for quiet enjoyment extends to a disturbance by the act of the covenantor himself, whether rightful or wrongful. The distinction is well established between acts done by the covenantor and acts done by a stranger. As regards the latter, the covenant for quiet enjoyment only extends to *legal acts*, but as regards the former, the covenant is against every act, whether rightful or wrongful. In Com. Dig. "Condition," (G. 12), it is said, "So, if a condition be that it shall be lawful for the lessee to enjoy; if the lessor enters upon him wrongfully, it is a breach; for the intent was that the lessor should not interrupt him: R. 1 Rol., 427, 1, 15; R. Cro. Eliz., 544." Again, in Com. Dig. "Covenant" (E. 1), as to what shall be a breach of a covenant for quiet enjoyment without interruption or molestation, it is said it shall be a breach: "If the covenantor himself wrongfully disturbs him. Otherwise, if a stranger interrupts wrongfully, without title." *Andrews v. Paradise*, 8 Mod. 319, decided that if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it. That case is a direct authority that the covenantor is liable for a disturbance, though the act done by him was of right. The distinction between a covenant against the acts of a particular individual, and a covenant against the acts of all persons, was recognized in *Nash v. Palmer*, 5 M. & Sel. 374. There Lord ELLENBOROUGH, C. J., said: "The rule has, I think, been correctly stated at the bar, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import, that is, to rightful title. It

is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise." *Fowle v. Welsh*, 1 B. & C. 29, is also an authority that where the covenant is against the acts of a person named, it extends to all claims by him, whether upon lawful title or otherwise.

PHIPSON (J. BROWN with him), for the defendant.—The general proposition of law, as stated by the other side, is not disputed. A simple covenant for quiet enjoyment extends only to lawful acts; but where the covenant is against the acts of the covenantor or third persons therein named it extends to wrongful as well as rightful acts. The cases on this subject are of two classes: there has been either a willful act of expulsion, or an entry under a claim of right. Where the covenantor *willfully* enters, it is of no avail that he does so as of right. In *Andrews v. Paradise*, 8 Mod. 319, the covenantor had a right to erect the gate which interrupted the enjoyment of the close. In *Nash v. Palmer*, 5 M. & Sel. 374, the party against whose acts the defendant undertook to indemnify the plaintiff entered under color of right. Again in *Fowle v. Welsh*, the entry was under a claim of title. Here the defendant is in possession of a quarry above the mine which he demised to the plaintiff, and he works it in the ordinary mode.

[POLLOCK, C. B.—Suppose a person demises a set of chambers beneath his own with a covenant for quiet enjoyment, and then does some act of annoyance in his own, which renders the other chambers uninhabitable, would not that be a breach of the covenant?]

The defendant had a right to work his quarry to the extreme boundary, and the plaintiffs should have left a barrier, to protect themselves from the water. *Humphries v. Brogden*, 2 Q. B. 739 (E. C. L. R. Vol. 64), decided that of common right, the owner of the surface is entitled to support from the subjacent strata; and assuming that the same principle applies here, the proper remedy is by an action on the case. In 2 Wms. Sunds., 178a, note, after stating the gen-

eral rule, it is said: "It may be observed that to entitle a party to maintain an action on a covenant for quiet enjoyment, some act of the defendant, or of those against whose acts he covenants, asserting title, must be proved; it would not be sufficient to show that the defendant disturbed the plaintiff by trespassing, as for instance, by sporting on the land. *Lloyd v. Tomkies*, 1 T. R. 671, is also an authority that the act must be done under an assertion of right. There is no authority to show that where there is no claim of title, or assertion of right or interference with the possession, the act complained of is within this covenant. Suppose a demise of a house, and that the lessor afterward erects near to it chemical works, which emit so disagreeable an effluvia as to annoy the inhabitants of the house, would that be a breach of the covenant? It is not every possible wrong which interferes with the enjoyment that is a breach of this covenant; but there must be either an actual expulsion or an interruption of the enjoyment under a claim of right.

ADDISON, in reply.—The covenant in this case provides for molestation, interruption or disturbance of any kind; and the arbitrator has found that in consequence of the defendant's acts the working of the plaintiffs' mine has become impracticable. It is equally a breach of the covenant whether the act which caused the interruption was done under a claim of right or not.

POLLOCK, C. B.—There must be judgment for the plaintiffs. The question is whether the covenant for quiet enjoyment extends to the facts found by the arbitrator. It seems to me that it would require some distinct authority to show that it did not. The defendant covenants, not only that the lessees shall peaceably and quietly occupy the demised mine, but, also, that they shall do so without any molestation, interruption or disturbance whatever from him.

Mr. PHIPSON put the case of a person who, having demised a house and entered into such a covenant, did some act on the adjoining land which caused a nuisance to the lessee. It is not necessary to say whether that would be a breach of the covenant, probably not. But here the connection between the two properties, the one being below the other, raises a different consideration. If a lessor demises the stratum below,

and covenants that he will do nothing to prevent its quiet enjoyment, he is bound so to use the surface as not to disturb the lessee in his occupation. Here the arbitrator has found that the defendant caused the plaintiffs great disturbance and interruption in the quiet enjoyment of the subject-matter of the demise.

MARTIN, B.—I am of the same opinion. The defendant has covenanted that the plaintiff shall enjoy the coal mine without any molestation or interruption from him. Then the defendant causes a quantity of water to flow into the mine, and also causes the roof to fall in, whereby the working of the mine becomes impracticable. There is no authority that such acts are not a breach of the covenant for quiet enjoyment.

WATSON, B.—I am of the same opinion. The action is brought on a covenant for quiet enjoyment by which the lessor covenants for his own acts and the acts of those claiming under him. It is clear that the plaintiffs are entitled to recover the £100, awarded as damage for making the holes. Then as to the £509 4s. 10d, awarded as damage for excavating the quarry, the arbitrator finds that, by his excavating it, he caused parts of the roof of the demised mine to fall in, and further that the plaintiffs were prevented from working the mine.

It seems to me that where a person covenants against his own acts, whether rightful or wrongful, such a disturbance of the occupation of the mine is a molestation and interruption within the meaning of the covenant. Indeed, I can not conceive any greater. It is not necessary that the covenantor should commit an act of interruption upon the demised premises; if he does something so near to them as to cause them partly to fall down, that is an act by which the lessee ceases to have the quiet enjoyment. On these short grounds I am of opinion that, upon the face of the award, the plaintiffs are entitled to recover, both in respect of making the holes and excavating the quarry.

CHANNELL.—I am of the same opinion. The plaintiffs seek to recover damages by reason of an alleged breach of the covenant for quiet enjoyment. It is said that the acts done by the defendant are not a breach of that covenant. Certain authorities were cited by Mr. Addison for the purpose of show-

ing that where there is a covenant for quiet enjoyment, as against the covenantor, it is immaterial whether the act done is rightful or wrongful; that is, an act which, but for the covenant, might have been rightful, becomes wrongful. Mr. Phipson did not dispute the authorities, but argued that they were inapplicable to this case. I am disposed to think that there may be an act done by a lessor who covenants against his own acts which may produce an injury of such a nature as to leave the covenantee to his remedy by action on the case. But looking at the terms of this covenant, and accepting Mr. Phipson's admission of the authorities, I am of opinion that the facts found by the arbitrator bring this case within the interpretation which he places on them. If the declaration had simply charged, not the modes by which certain results had been accomplished, but the results themselves, and they had been proved to have been the act of the defendant, the case would have been clearly within the covenant against any molestation or interruption by the lessor himself.

Addison then applied for a writ of injunction, which was granted.

Judgment for the plaintiffs, and injunction granted.

¹HARLAN ET AL. V. THE LEHIGH COAL AND NAVIGATION Co.

(35 Pennsylvania State, 287. Supreme Court, 1860.)

²Interest of lessee defined. A lease of the right to mine coal is the grant of an interest in the land, and not a mere license to take the coal.

³No implied covenant of existence of veins. Defendant let to plaintiff the right to mine coal from two certain veins named in the lease, at a royalty. *Held* that the lease contained no implied covenant of the existence of workable veins.

Warranty, when implied. A warranty may be implied when our common sense of justice requires it, and it is essential to complete the definition of the relation intended to be established between the parties; but its terms must be clearly deducible from the instrument and from the nature of the transaction.

¹S. C., 8 M. R. 423.

²*Carr v. Benson*, L. R. 3, Ch. App. 524.

³*Spoor v. Green*, L. R. 9, Ex. 99.

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Mutual mistake as to existence of veins. If the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he can not have relief in an action in affirmance of it. He can not recover for his outlays in seeking for the supposed veins.

Error to the Common Pleas of Carbon County.

This was an action of covenant, by Ezekiel W. Harlan and Robert Henderson against the Lehigh Coal and Navigation Company, upon a covenant alleged to be contained in a coal lease from the defendants to the plaintiffs, that the places therein designated were veins of stone coal. The breach alleged was that the supposed mines were not coal mines, and did not contain stone coal, contrary to the tenor and effect of the defendants' covenant. The case was before this court on a former writ of error, and is reported in 3 Casey, 429. (See 8 M. R. 423, where the entire lease is given in the report of the original appeal.)

The court below, in answer to points presented by the plaintiff, charged the jury as follows:

"The defendant does not covenant for coal in any of the veins. He lets them and the plaintiffs take them, subject to the ordinary risk of mining, without any covenant, express or implied, of the existence of coal, or of the quantity or of the quality of coal."

To this instruction the plaintiffs excepted; and a verdict and judgment having been rendered for the defendants, the plaintiffs sued out this writ, and here assigned the same for error.

REEDER & GREEN, for the plaintiffs in error.

The agreement of 12th April, 1847, was a grant and not a mere license: *Thomas v. Sorrell*, Vaugh. 351; *Wood v. Leadbitter*, 13 M. & W. 845; 2 *Parsons on Contracts*, 22; *Cook v. Sterns*, 4 Mass. 533. And we appeal to the agreement itself, and say, that the court below erred in ruling that the defendants made no covenant of the existence, quality or quantity of coal in any of the veins. We insist that it con-

tains such a covenant: *Parkhurst v. Smith*, Willes, 332; *Gibson v. Minet*, 1 H. Bl. 569; Platt on Covenants, 136; *Clanrickard v. Sidney*, Hobart, 277; 2. Wils. 75; 1 Vent. 141; 1 Mod. 175; *Seddon v. Senate*, 13 East, 74; *Robertson v. French*, 4. Id. 130; *Hargrave v. Smea*, 3 M. & S. 581; *Kane v. Hood*, 13 Pick. 282; *Broughton v. Conway*, Platt on Covenants, 138; *Griffith v. Goodhand*, T. Raym. 464; Skin. 40; 1 Sheph. Touch. 82, 83; *Shrewsbury v. Gould*, 2 B. & Ald. 487; *Webb v. Plummer*, Id. 746; *St. Albans v. Ellis*, 16 East, 352; *Miles v. Stevens*, 3 Barr. 21; *Parker v. Smith*, 17 Mass. 413; *Selden v. Williams*, 9 Watts, 9; *Daily v. Beck*, Brightly, 107; *Lewis Street, In re*, 2 Wend. 472; *Lehigh Coal and Navigation Co. v. Harlan*, 3 Casey, 430; *Miller's Appeals*, 6 Id. 478.

M. GOEPP, A. E. BROWN and MALLERY, for the defendants in error.

The opinion of the court was delivered by LOWRIE, C. J.

We regard this coal lease as a grant of an interest in land, and not as a mere license to take coal: 7 Casey, 477. The question is, did the lessors warrant that there was coal in the supposed veins, and if so what were the terms of the warranty? We do not imply a warranty that the property demised is fit for the purposes for which it is demised: 2 Casey, 117; but it is insisted that a warranty is involved in the nature of the grant and of its terms, as expressed in the lease; and that not the ordinary warranty of grants of real estate, which is measured by the consideration paid, for that would be of no profit to the lessees here. Whatever be its character, it must be a warranty that is definite in its terms, else it furnishes no measure of the plaintiffs' rights and, as a contract, can not be enforced. Therefore a warranty even that there were coal veins, or that there was some coal in the veins, would not answer the purpose; for, if there had been found some coal there it would not have prevented their complaints if the veins had not been worth working. The plaintiffs must, therefore, be understood as insisting upon a warranty of sufficient coal to compensate them for their outlay in reaching it, or in mining

for it, for that alone could be of use to them. Is such a warranty involved in this contract of lease? We think not.

Undoubtedly the court will construct a warranty or other contract where none is in terms expressed by the parties, if our common sense of justice requires it, and it is essential to complete the definition of the relation plainly intended to be established between the parties, and if its terms can be clearly deduced from the instrument, and from the nature of the transaction. The cases cited for the plaintiffs abundantly illustrate this principle, and we may test this case by it.

We do not discover that there is any unexpressed term of this contract, which common justice requires us to supply, or any that is necessary to complete the definition of the relation intended to be established. We have already sufficiently indicated our opinion (3 Casey, 439) that the expense of a fruitless search for these veins was not intended to be charged to the lessors, and of course we can not construct any such warranty. It was undoubtedly coal veins that were intended to be leased, and if the parties were mistaken about the fact, the result would be a right to dissolve the contract and not a right to have a different contract in its stead. It is quite apparent that the R and S veins were known subjects of contract, that they were supposed to exist in the lessor's land as they did elsewhere, and that the lease was intended as a grant of the right to find and work them. But we have nothing that entitles us to construct a warranty that the lessees should be able to find and work them.

Judgment affirmed.

KIER V. PETERSON.

(41 Pennsylvania State, 357. Supreme Court, 1861.)

Property in oil found by lessee of salt wells. Defendants were the lessees of lands under covenant to sink and operate salt wells at a royalty of each twelfth barrel of the salt manufactured. After the wells were in operation some time, petroleum began to flow with the brine and tro-

ver was brought against the lessees for its conversion: *Held*, ¹ That the oil was the property of the lessees.

Error to the District Court of Allegheny County.

This was an action on the case brought in the court below by Lewis Peterson against Samuel M. Kier, who survived Thomas Kier. The plaintiff declared in trover for 50,000 gallons of carbon oil or petroleum of the value of \$20,000, to which the defendant pleaded not guilty.

The oil for which the suit was brought was the unexpected product of certain wells which had been sunk by the defendant on land leased to him by the plaintiff for the purpose of manufacturing salt.

There were no disputed facts in the case, and the amount of damages due to the plaintiff (if entitled to recover at all) was agreed upon by the counsel on both sides; for which a verdict was entered, subject to the opinion of the court in banc on the questions of law presented by defendant's counsel.

On argument the court delivered a learned and elaborate opinion on the reserved points and directed the entry of judgment on the verdict. The case was thereupon removed into this court, where the ruling of the court below was assigned for error. All the material facts of the case will be found in the opinion of the court.

HAMILTON & ACHESON, for plaintiff in error, contended:

1. That Kier had a freehold estate for life at least in the land described in the lease, determinable on the happening of the contingencies therein mentioned, but not limited to any particular portion of the demised premises; that he was therefore entitled to all the rights and privileges of a tenant for life, and, without proof of having caused or stimulated the flow of the oil he was not chargeable with "waste," citing and

¹ This is the only point decided by the opinion of the majority of the court. The syllabi of the original report are taken from a separate opinion of WOODWARD, J., who differs with the court in everything except the point that *trover* would not lie. In this opinion he held that the oil was the property of the *lessor*, but that his remedy was by bill for an accounting and the syllabi of the official report read to the same effect. The case below is found in 2 Pittsburg R. 191.

commenting on *Lynn's Appeal*, 7 Casey, 44; *Harlan v. The Lehigh Coal Company*, 11 Id. 287.

2. That the lessor could not maintain this action without proof that he had a right of property in the oil at the time of the conversion, to wit, when it was intercepted by the tenant. But as its origin and source were unknown it was like the elements, only susceptible of a qualified ownership: 1 Bl. Com. 317; *Acton v. Blundell*, 12 M. & W. 324; *Tyler v. Wilkinson*, 4 Mason, 401.

He must also have had the right of possession at the time: 2 Saunders on Pl. & Ev. 1138. The conversion, which took place the instant the lessee assumed ownership of the oil, took place on the demised premises on which the lessor could not enter to take possession of the oil without being guilty of trespass.

D. W. & A. S. BELL, for defendant in error, insisted that the rights and privileges ordinarily incident to a tenancy for life were in this case modified and restricted by the terms of the lease or agreement between the parties, which included nothing more than the use of the land leased for the manufacture of salt, for certain rents therein mentioned. The doctrine of waste is not applicable to this case. The question simply is, whose oil is this which comes up with the salt water, for which the land was leased? It belongs to the owner of the reversion, no matter what its value may be, or what may be done with it, if not granted in express terms to the lessee.

2. The source of the oil may be unknown, but as it does not flow, but is a permanent matter found upon the lessor's land, and only comes out of it when dug for, the right of property is in the owner of the reversion.

As to his right of possession, it can be exercised anywhere, and at any time, if the rights of the lessee are not interfered with. The lessee was, perhaps, not bound to preserve this oil, but having done so, it belongs to lessor, and is then, as severed from the freehold, personal property, and the action is well brought: *Mather v. Ministers of Trinity Church*, 3 S. & R. 511; *Shult v. Barker*, 12 S. & R. 273.

The opinion of the court was delivered March 22, 1862, by READ, J.

On October 30, 1837, Lewis Peterson entered into articles of agreement with Thomas Kier and Samuel M. Kier, by which he leased to them and their assigns a certain lot or piece of ground owned by him, in the county of Allegheny, and adjoining the Pennsylvania canal, with the privilege on the said premises to bore salt wells and erect all manner of buildings necessary or useful in the prosecution of the manufacture of salt; and to use all coal in the hill in the rear of the said premises, within the boundary lines of said Peterson's land that may be necessary and proper to the successful prosecution of said manufacture, together with the right of taking from the before described premises timber and stone to erect and keep in repair the establishment therein contemplated. It was also agreed that the said Peterson should be at liberty to lay a railroad near Hume's line, from the coal bank on the hill to the canal, provided it does not interfere with the interests of lessees in the conduct of their works and improvements. It was further agreed that the lease should endure as long as the salt wells therein contemplated to be established should be carried on by the said Thomas Kier and Samuel M. Kier, the survivor of them or by their assigns. Then followed a proviso, "that if the said parties of the second part (the Kiers) shall let the salt wells erected on said premises remain idle or out of use for three continuous years, then the said Peterson shall be at liberty to enter upon possession of said premises as if the lease had never been entered into." Should the said parties of the second part be induced to abandon their works and improvements at any time, they shall be at liberty to remove from the premises all machinery and fixtures, except houses and buildings connected with the manufacture of salt; and it was further agreed that the salt wells about to be established shall be in operation within one year from the date of this article, and if delayed two years from the date of this article, said Peterson to take possession as before described.

In consideration of which the said Thomas Kier and Samuel M. Kier agree to pay unto the said Lewis Peterson the one twelfth barrel of all the salt made on the said premises, to be delivered to the said Lewis Peterson or his authorized agent, at the works on the said premises on the first days of Janu-

ary, April, July and October in each and every year during the continuance of this lease.

It will therefore be perceived that this instrument gave a life estate to the Kiers and the survivor, to endure as long as the salt wells shall be carried on by them or their assigns, with two conditions, the first of which, as to putting the salt wells in operation, has been fulfilled, and has therefore no longer any existence, and the second, as to letting the salt wells remain idle or out of use for three continuous years, has never been broken. In fact it is conceded that all the covenants and agreements of the lessees have been strictly complied with, including the payment of the stipulated rent.

The lessees, therefore, had a freehold estate for life in these premises on condition, without any other restriction or limitation except what is expressly stated on the face of the articles of agreement, subject only to this: these lessees were tenants for life of this property, and with all the rights belonging to such an estate.

The defendants went into possession of the demised premises, sunk a well in 1839, erected works and commenced and continued the manufacture of salt; and about 1845 carbon oil, or petroleum, arose in the well in connection with the salt water, and the real question is, to whom does this oil belong, to the lessor or the lessees? The oil must be separated from the salt water or the lessees can not carry on their manufacture of salt, and they are clearly not obliged to keep it if they do not think it expedient, but may let it run into the canal as they did at first.

They are certainly not guilty of either legal or equitable waste because the well through which the oil reaches the surface was opened in direct obedience to the stipulations in the lease, and must be continued open and kept in operation in order to prevent a forfeiture, and to enable the lessees faithfully to pay a fair rent in the stipulated article of manufactured salt, the purified product of this very well.

If mines are already opened, or if the lease permits their being opened, it is not waste for the tenant to work them even to exhaustion. Nor would it be waste to open new shafts or pits to follow the same vein. So, as to salt works, if there is an existing salt well and works, it would not be waste to dig a new salt well in connection with it: *Findlay*

v. *Smith*, 6 Munnford, 134. There is therefore no charge of waste of any kind against the lessees.

If this had been an open spring throwing out salt water, and finally petroleum also, could there be any doubt that it would be a part of the accruing profits? So if it had been an open salt well, would it not be in the same category? What difference, then, is there between these cases and a salt well opened in express conformity to the articles of agreement? It is the same as if it had been there before the lease was signed.

Petroleum or rock oil is essentially composed of carbon and hydrogen, and is a liquid and inflammable substance or bitumen exuding from the earth, and is collected in various parts of the world—on the surface of the water, in wells and fountains, or oozing from cavities in rocks.

In the decomposition of vegetable substances, there are formed besides carburetted hydrogen, exhalations of which are of frequent occurrence in rock salt formations, liquid and solid hydrocarbons, such as naphtha and petroleum, or mineral oil, mineral tar.

In Marietta in the State of Ohio, the inflammable gas is a constant attendant upon brine springs, so that its appearance while boring in search of rock salt is looked upon as an indication of a favorable result; and in China the inflammable gas has been used to boil the brine, and also to heat and light the buildings in which the salt is prepared. On the shores of the Caspian Sea there is a tract called the field of fire, which continually emits inflammable gas, while springs of naphtha and petroleum occur in the same vicinity.

On the surface of the Dead Sea, which is very salt, asphalt is found in a soft or liquid as well as a solid state, and it is said by high authority that bitumen in small particles hardly visible, but distinguishable by the smell, occurs in all the minerals of the saliferous system.

The presence, therefore, of petroleum or mineral oil is naturally to be expected in the salt formation west of the Allegheny Mountains, and although its great value has not been fully appreciated until within a few years, still if it comes up, as in the present instance, with the brine of a well which was opened in pursuance of, and must be regularly worked by, the express stipulations of the lease, it must belong to the les-

see, who must separate it from the salt, and either let it run to waste or prepare it for the market. This is the evident justice of the case, which can only form the rule for a very small number of possible cases. There is also another consideration. Petroleum frequently contains paraffine, a substance in a pure state resembling spermaceti; but when mingled with a small quantity of petroleum, it assumes the consistence of butter. In this state it would tend to clog the pumps in a salt well, particularly around the bucket and valves. Upon the whole we are of opinion that the petroleum which is sought to be recovered in this action was the property of the defendant below, and this renders it unnecessary to consider any of the other questions in the cause.

Judgment reversed and judgment entered for the defendant.

THOMPSON, J., dissents.

Concurring opinion delivered March 27, 1862, by WOODWARD, J.

I concur in the judgment of the majority, on the ground that the plaintiff's action was misconceived. I hold that trover was not his appropriate remedy. A few words will suffice to exhibit my views.

Petroleum, or as it is called in the West Indies, Barbadoes tar, is a species of mineral, which, while it exists in its natural deposits in the earth, is included in the very comprehensive idea which the law attaches to the word land. It is part of the land. It is land. As such it belonged to Peterson, in the place where the present dispute arose. He held it by the same title by which he held the surface, or the salt which underlay the surface. He was absolute proprietor of all things between the surface and center of the earth at that place, saving only the government's right to share in the gold and silver that might be found. It was his freehold, and the petroleum and the salt were parts of the freehold.

By the article of agreement of October 30, 1837, he leased the premises to Thomas and Samuel M. Kier, for purposes of salt wells. Under certain conditions and restrictions the lease

was to endure as long as the salt wells should be carried on by the Kiers, the survivor of them or their assigns. The rent reserved was every twelfth barrel of salt made on the premises. It was in effect and substance a sale of the crude salt in the land for one twelfth of the manufactured article. Now, there is no doubt that the absolute owner of land may sell a partial interest in it as well as the whole. He may sell the surface and retain the minerals, or he may sell one or more of the minerals and retain the surface. This is every day's experience in the mining districts.

But it is self-evident that when he carves out a particular interest and sells it, he retains all the rest as absolutely as before he conveyed a part. Therefore I can not doubt that Peterson was as exclusively and as absolutely the owner of the petroleum in this land after the lease of October 30, 1837, as before. There is not a word in the instrument which imports his intention to part with anything more than the salt in his land, and such timber and stones as should be necessary for erecting and maintaining salt works. Every matter and thing in, and pertaining to, the land, which was not conveyed to the Kiers by that instrument, was retained by Peterson.

But the Kiers could not exercise their right to raise salt without raising petroleum. They severed both the salt and the petroleum from the freehold, and brought both to their lawful possession at the surface. They were not trespassers. The severance of the petroleum was an inevitable incident of their exercise of clearly granted rights. The grant of the right to take salt was the grant of all incidental rights which were indispensable to the exercise of the main one. Hence, their severance of the petroleum from the freehold and their possession of it, were lawful. The work of separating the oil and salt was not difficult. With opportunity given them the fluids would separate themselves. But the Kiers, in lawful possession of both before separation, were to control the work of separation and were in lawful possession of each after that work was accomplished. For this reason I hold the action of trover will not lie. Although Peterson had not lost his right of property in the petroleum, yet a mere right of property in a chattel is not sufficient to maintain trover. The

plaintiff must have also the right of possession at the time of conversion: 1 Chit. Pl., 164; Saunders' P. & E., 1138. In *Mather v. Trinity Church*, 3 S. & R. 509, the principle was carried further still, and it was held that trover for stone and gravel dug from land, does not lie by one who has the right of possession against a person who has actual adverse possession of the land and sets up title to it. In our case Peterson had no right of possession of the land whatever, and the Kiers were not in as mere adverse holders, but Peterson had conveyed the right of possession to them, and they were in, under and according to his title. Nor were they guilty of waste in severing the petroleum from the freehold, since it was an inseparable consequence from the right granted to them by the landlord. Their actual possession, therefore, of the severed chattel, was in every sense a rightful possession, and because no right of possession existed in Peterson at the moment of severance, trover will not lie.

On this ground alone I am for reversing the judgment. I hold Peterson entitled to compensation for the value of his oil, and I suppose a bill in equity for account would be his most natural and efficacious remedy. I think the learned judge below apprehended correctly the measure of compensation. Peterson would not be entitled to the labor of the Kiers, but only to the value of the oil at the instant of separation from the freehold. But his remedy, whatever the extent of it, is to be sought in another form of action.

SENHOUSE ET UX V. HARRIS.

(5 Law Times N. S. 635. Court of Queen's Bench, 1832.)

Engine working two mines—Apportionment of rent—Coal consumed by the colliery engines. The lessee of Ewanrigg colliery took a lease of the Ellenborough colliery adjoining, from the plaintiff, by which latter lease he was entitled to get the coal from the latter mine at a certain rent, with liberty to bring the coal got in the first mine to the surface by way of outstroke through the second, the Ellenborough colliery, on payment of one and one half pence per ton for outstroke, water course rent, and shaft rent. No rent was to be paid from any coal got from the latter colliery, which should be

used by any engine employed in working or carrying on the second mine. *Held*, that no rent was payable for coal used in working the engine of the second mine when employed in bringing up the coal from the first mine, such engine being at the same time used in draining the second mine, because: (1) Of the difficulty in saying what amount of coal was used for raising coal, and what amount for raising water from the other mine; and, (2) The coal consumed for raising might fairly be construed as paid for in the rent reserved for raising through the second mine.

¹ "Coal raised." The term "coal raised" may signify "coal got or won," or "coal brought to the surface," according to the context.

This was a special case for the opinion of the court as to the construction of a colliery lease.

The following are the material circumstances:

The defendant, Harris, being the lessee of a coal mine called the Ewanrigg colliery, under a Mr. Christian, took a lease from the female plaintiff, of another coal mine, called the Ellenborough colliery, immediately contiguous to the Ewanrigg mine. By the terms of this lease he was not only to be entitled to get the coal from the Ellenborough mine at a certain rent agreed on, but was to be at liberty to bring the coal got in the Ewanrigg mine to the surface (as it is termed in the lease, by way of "outstroke") through the Ellenborough mine, on payment of a sum of three half pence per ton for outstrokes, water course rent, and shaft rent. By a provision in the lease, no rent was to be paid for any coal got from the Ellenborough colliery, which should be "used or consumed on or for any engine employed in working or carrying on the collieries and coal mines thereby demised, or in any other way, or for any purpose necessary or proper for the carrying on of the said collieries and coal mines thereby demised.

Nov. 15th, S. TEMPLE (KEMPLAY with him), argued the case for the plaintiffs, and MANISTY (C. HUTTON with him) for the defendant.

Cur. adv. vult.

January 20th. COCKBURN, C. J., now delivered the judgment of the court, and after stating the material circumstances as above, proceeded as follows:

The defendant having availed himself of the privilege thus granted of bringing the coal got in the Ewanrigg colliery

¹ *Griffiths v. Rigby*, 2 M. R. 523.

through the Ellenborough mine, and by means of the shaft and engine belonging to the latter to the surface, a question arises whether the immunity from payment of rent, in respect of coal used for any engine employed in the working of the Ellenborough colliery, extends to coal used on the engine when employed in bringing up the coal from the Ewanrigg through the Ellenborough mine. We are of opinion that it does; in the first place, because, as the engine must be kept at work, if not for the purpose of raising the coal got from the Ellenborough mine, at all events for that of keeping that mine free from water, it seems that it would be extremely difficult, if not impossible, to determine how much of the steam power was appropriated to the purposes of the Ellenborough colliery, and how much to the raising the coal by way of outstroke from the Ewanrigg mine; secondly, because, as in raising the coal got in the Ewanrigg mine to the surface by way of outstroke through the Ellenborough colliery, the engine fixed in the Ellenborough colliery must necessarily be employed, and the coal consumed in working such engine may fairly be considered as paid for in the amount agreed to be paid per ton for the privilege of raising the coal by way of outstroke through the Ellenborough colliery. A second question arises on a privilege granted to the defendant Harris, in working the Ewanrigg mine, to carry the coal raised from that mine to the neighboring port of Maryborough, by means of a private tramway leading from the boundary between the two collieries, but belonging to the plaintiffs, such privilege being by the terms of the lease, to be enjoyed on payment of the sum of $2\frac{1}{2}d.$ per ton on the coal carried. The question has reference to the coal got from the Ewanrigg mine and raised by outstroke through the Ellenborough colliery; it being contended on the part of the defendant that he is entitled to convey the coal so raised, by the tramway in question, without payment of the $2\frac{1}{2}d.$ per ton, payable, as mentioned, in respect of coal conveyed by the tramway direct from the Ewanrigg colliery. Our judgment upon this point is adverse to the defendant. The privilege of using the tramway is not, in the lease, in any way connected with the bringing the coal to the surface by way of outstroke through the Ellenborough mine. It exists quite independently of the latter, in respect

of all coal whatsoever raised from the Ewanrigg mine, and the provision for payment to be made in respect of coal conveyed by the tramway in general, without any distinction between coal brought to the surface direct from the Ewanrigg colliery and that brought to bank by way of outstroke. The right to bring the produce of the Ewanrigg mine to the surface through the Ellenborough colliery does not necessarily carry with it the right of using the Ellenborough tramway, as the coal might have been conveyed by the way otherwise appropriate to the Ewanrigg colliery. Lastly, it seems absurd to suppose that the payment for the right of outstroke being $1\frac{1}{2}d.$ per ton and the payment for the use of the tramway $2\frac{1}{2}d.$ per ton, the proprietors of the Ellenborough mine should have been willing to superadd the latter privilege to the former under the outstroke rent, foregoing altogether all payment in respect of a privilege, on the exercise of which a higher money value appears avowedly to have been set. Not only, therefore, is there no provision to warrant the contention of the defendant, but the reason of the thing is the other way. An argument is, however, raised on behalf of the defendant on the wording of the clause of the lease relating to the payment to be made in respect of coal conveyed by the tramway. The payment is to be in respect of all coal "raised" in the lands held by the defendant under Christian; and the defendant contends that, by the term "raised" must be understood "brought to the surface," and consequently that coal brought to the surface through the Ellenborough colliery is not in that sense coal "raised" in the lands of Christian. But there can be no doubt that the term "raised" has two meanings. It may signify as well coal got or won as coal brought to the surface. Had the passage stood alone, we should have been disposed to ascribe to the term the former of these meanings; taken in connection with the other provisions of the lease, we entertain no doubt that such is its true interpretation. We are of opinion that the defendant is liable to pay the stipulated amount of $2\frac{1}{2}d.$ per ton for all coal, the produce of the Ewanrigg colliery, conveyed upon the tramway, though the same may be brought to the surface through the Ellenborough colliery.

HODGSON v. MOULSON.

(18 Common Bench N. S., 332. 114 Eng. C. L. R. 330; Common Pleas, 1865.)

¹**Construction of covenant for surface support.** By a mining lease the lessees covenanted *inter alia* that they would leave pillars "of sufficient strength to support the roof of the said mines." The lease contemplated an exhaustion of the mines. It also contained covenants to pay for surface damage: *Held*, that the lessees were liable to the reversioner for damage done to the surface of the land by its subsidence notwithstanding the supports left were sufficient to support the roofs of the mines for purposes of further working as mines.

The following case was stated (without pleadings) for the opinion of the court:

1. By indenture of lease, bearing date the 1st of December, 1853, John Bower granted and demised to the defendant and others for a term of twelve years from the 1st of July then last past, all the stone, slate and flag lying and being in and under a certain part of certain closes of land situate at Legrams, in the township of Horton in the parish of Bradford, in the county of York, with full and free liberty, power and authority for the lessees and their and every of their agents, servants and workmen at all times during the continuance of the said demise at their own costs, charges and expenses, to enter into and upon the said thereby demised premises, or any part thereof, and there to dig, bore, delve, sink for, raise, get and work the said stone and for that purpose to sink such pits, and shafts and set up such engines, whimsies, cranks, gins and other machinery and to make use of such devices, ways and means as should be found necessary or expedient for working raising and getting the said stone in the best manner, or as had been usually practiced in such cases in the township of Clayton in the parish of Bradford aforesaid; and each of the said lessees in and by the said indenture of lease, a copy whereof was annexed to and was to be taken as a part of the case,² thereby for himself covenanted with the said John

¹ *Dugdale v. Robertson*, 3 K. & J. 695; *Post* SURFACE SUPPORT.

² The indenture was dated the first of December, 1853, and was made between John Bower (through whom the plaintiff claimed) of the one part,

Bower, his heirs and assigns, that they, the said lessees, should and would from time to time and at all times during the said term, work the said pits, mines and shafts in a workmanlike manner, and leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same was then done in other works of like character in Clayton aforesaid, and should and would on the expiration or other sooner determination of the said term (amongst other things) remove all the stone, spoil or rubbish which should have been brought out of the said pits or shafts and convert the land which should have been used by them for any of the purposes in the said lease, into good arable land, or, in default thereof, should and would pay or cause to be paid unto the said John Bower, his heirs or assigns, the sum of £100 for every acre, and so in proportion for every quarter or less quantity than an acre, of such land not converted into arable land, as and for liquidated damages.

2. By another indenture of lease, dated the 11th of December, 1857, the said John Bower granted and demised to the defendant and the said other lessees, for a term of ten years from the 1st of January then next, all the residue of the stone, slate and flag lying and being within and under the said closes respectively, with the same liberties and powers, and subject to the same covenants on the part of each of the

and Miles Moulson, John Moulson, William Moulson and David. Moulson (the defendant) of the other part. It recited that the Moulsons had agreed with Bower to grant to them a lease of "the stone now lying and being within and under such part or parts of the closes of land hereinafter mentioned, as are hereinafter particularly described," and that the stone under certain other parts of the said closes of land had been already partly wrought, gotten and disposed of. It then witnessed that in consideration of the premises and of the rents, payments, covenants, and agreements thereinafter reserved and contained, etc., Bower granted, demised and let unto the Moulsons, their executors, etc., all the stone, slate and flag lying and being in and under the surface of such part or parts of certain closes of land situate, etc., belonging to the said John Bower, and now occupied by John Diggles as his tenant, and which part or parts is or are more particularly described in the plan or ground plot drawn upon those presents and therein colored green, and containing by admeasurement 14,520 square yards, with full and free liberty, power and authority for the lessees, their executors, etc., and their and every of their agents, servants, and workmen, at all times during the continuance of this demise, at their own costs,

said lessees as are contained in the said indenture of lease first above mentioned.

3. By indenture of grant and release, dated 13th of January, 1858, the said John Bower, (being then seized in his demesne as of fee of and in the said closes of land in the said indentures of lease respectively mentioned, subject to the said estate and interests therein of the said lessees in and by the said indentures of lease respectively created,) conveyed all his, the said John Bower's, said estate and interest of and in the said closes of land respectively, to the plaintiff, who, from that time until the commencement of this suit, has continuously occupied the said closes respectively.

4. The said closes contained two beds or strata of stone—one near to the surface called the top stone, and the other about thirty yards below the surface, called the bottom stone; the intervening soil between the said two beds or strata being of the depth of twenty yards or thereabouts. The top stone could not be got without removing the soil over it, but the bottom stone could be got without removing the soil intervening between the two beds or strata.

5. Prior to the granting of either of the said indentures of lease, the top stone under certain parts of the said closes, had, to the knowledge of the said parties to said leases, been

charges and expenses, to enter into and upon the said hereby demised premises, or any part thereof, and there to dig, bore, delve, sink for, raise, get and work the said stone, and for that purpose to sink such pits and shafts and set up such engines, whimsies, cranks, gins and other machinery, and to make use of such devices, ways and means as shall be found necessary or expedient for working, raising and getting the said stone in the best manner, or as is usually practiced in such cases in the township of Clayton, in the parish of Bradford aforesaid, and to occupy from time to time so much of the said demised premises as may be necessary for placing, laying up and dressing such stone and for laying and stacking up the spoil or rubbish to be raised out of the said pits and shafts, and from time to time to take down the said engines, whimsies, cranks, gins and other machines erected and set up for the purposes aforesaid, and the materials thereof, as to them, the lessees, their executors, etc., shall seem meet, and to re-erect them on other parts of the said hereby demised premises, and to have, take and carry away at their own free will and pleasure, and to convert for and to their own proper use and benefit all such stone as shall be gotten or raised from the said pits and shafts with liberty to use all ways, watercourses, etc. *Habendum* for twelve years from the 1st of July then last, but determinable nevertheless as thereafter mentioned. Yielding

quarried and worked out to the depth of thirty feet, or thereabouts, from such parts of the surface of the said closes respectively as are hereinafter stated to have subsided, cracked and given way, as hereinafter mentioned; and the surface of the said parts of the said closes respectively was afterward, and before the granting of the said indentures of lease respectively, or either of them, leveled, trenched and restored, so as to render it fit for agricultural purposes, for which it had been used for upward of forty years next before the said top stone was so quarried and worked out as aforesaid; and for which uses it has been used ever since the same was so leveled, trenched and restored, as aforesaid.

6. After the execution of the said indentures of lease respectively, the said lessees entered upon the said demised premises and there sank pits and shafts, and worked the said mines in a workmanlike manner, and got and cleared thereout large quantities of the said stone so granted and demised as aforesaid, in the usual and best way in which stone was at the times of the granting of the said indentures of lease re-

and paying therefor during the said term unto the lessor, his heirs and assigns, 2s. 6d. per superficial square yard, to be paid as a yearly rent, in two equal half yearly payments, on the 1st of January and 1st of July in every year, and in no half year to be less than £75 12s. 6d. (whether stone to that amount shall have been gotten or not), or such greater sum, after the rate of 2s. 6d. for each superficial square yard of stone which shall have been gotten during each half year, as may on an admeasurement thereof be found to be due. Then followed covenants by the lessees to pay rent and taxes, and from time to time, and at all times during the term thereby granted, to fence off the pits or shafts to be sunk in the demised premises, and also such portion of the same as should be occupied by them for the purposes aforesaid, and to keep the fences and gates in repair. Then followed the covenant upon which the action was founded: "And also shall and will from time to time, and at all times during the said term, work the said pits, mines and shafts in a workmanlike manner, and leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton aforesaid." And also shall and will, from time to time, on demand, pay to the occupier or occupiers, for the time being, of the said closes of land, double the amount of rent paid by such occupier or occupiers for such portion of the surface of the said closes of land as they may use for the purpose of getting or working the stone, or for laying and stacking up the spoil or rubbish to be raised out of the said pits or shafts, and also reasonable satisfaction for any damage that may be committed or occasioned on the adjoining lands or the crops respectively

spectively got and cleared in works of a like character in the township of Clayton aforesaid; and in so getting and clearing the said stone as last aforesaid, the lessees left pillars of the solid stone of sufficient strength to support the roofs of the said mines so far as was requisite for the purpose of working the said mines themselves in a thorough and efficient manner, but neglected and omitted to leave any such pillars as aforesaid of sufficient strength to support the roofs of the said mines so as to prevent the subsidence, cracking and giving way of the said parts of the surface of the said closes respectively, which are hereinafter stated to have subsided, cracked and given way as hereinafter mentioned.

7. Previously to the commencement of this suit divers parts of the surface of the said closes respectively had subsided, cracked, and given way, in such a manner and to such an extent as to materially interfere with the beneficial user of the surface of the said parts of the said closes respectively, solely by reason of the said lessees having so omitted and neglected as aforesaid to leave any such pillars as aforesaid of sufficient strength to support the roofs of the said mines so as

growing thereon; and also make satisfaction to such occupier or occupiers for the time being as aforesaid for any damage which he or they may sustain by reason of his or their horses or other cattle receiving any damage by falling into any of the quarries, works, shafts or pits to be made in the working of the said stone hereby demised, through the insufficiency of the fences thereof, or by leaving open any gate or gates, or by or through any other default or neglect of the said lessees, their executors, administrators and assigns. Then followed a covenant on the part of the lessees not to grant, demise, let, assign or set over or otherwise part with the stone or privileges thereby granted, or their estate, term or interest in the same, without the consent in writing of the lessor, his heirs or assigns.

The *reddendum* was as follows: "And also shall and will, on the expiration or other sooner determination of the said term hereby granted, peaceably and quietly leave, surrender and yield up the same premises unto the said John Bower, his heirs and assigns, and within two months after the expiration or other sooner determination of the said term, fill up the said pits and shafts and remove and take up all engines, whimsies, cranks, gins, machines and other erections, which shall have been made or erected during the said term for the purpose of getting the said stone, and remove all the stone, spoil or rubbish which shall have been brought out of the said pits or shafts, and convert the land which shall have been used by them for any of the purposes aforesaid into good arable land, or in default thereof shall and will pay or cause to be paid unto the said John Bower, his heirs or assigns, the sum of £100 for every acre, and so in proportion for every

to prevent the said subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively. In the township of Clayton it is usual to leave pillars of stone, but notwithstanding, the roofs of the mines often fall in, and the consequence is that a subsidence of the surface soil in that township often takes place when the bottom stone is being worked.

8. The question for the opinion of the court is, whether, upon the facts above stated, and regard being had also to the provisions of the said indenture of lease, a copy whereof was annexed to the case, the said lessees were bound, either by the provisions of the said indentures of lease respectively, or otherwise, to have left pillars of solid stone of sufficient strength to have prevented the said subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively as above mentioned.

9. If the court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiff for £352 and costs of suit. If the court should be of opinion in the negative then judgment of *nol. pros.* with costs of defense, was to be entered up for the defendant.

QUAIN, for the plaintiff.¹

The question is whether the defendant performed the covenant, which he entered into, to "leave pillars of the solid

quarter or less quantity than an acre of such land not converted into arable land as and for liquidated damages."

Then followed a power for the lessor to enter to view the condition of the mines, powers of distress and re-entry on non-payment of the rents and royalties or non-performance of the covenants, or in case of the bankruptcy of the lessees; and also a proviso for ceaser of the term in case all the stone should be paid for and gotten and cleared off by the lessees before the expiration of twelve years, a covenant for quiet enjoyment by the lessees, and a proviso for reference of disputes to arbitration.

¹The points marked for argument on the part of the plaintiff were as follows:

"(a) That the plaintiff is entitled to have pillars of solid stone left in the mine, of sufficient strength absolutely to support the roofs of the mine, and so to prevent the subsidence of the surface.

"(b) That he is so entitled by virtue of the express words of the defendant's covenant; and that those words can not be controlled by any usage or custom."

stone of sufficient strength to support the roofs of the mines" so as to prevent the subsidence of the surface, or whether he satisfied the terms of his contract if he left sufficient for his own working of the mines. It is submitted that even without this covenant, the surface being reserved to the owner of the soil, the facts stated in the case give the plaintiff a clear cause of action.

The court called on MELLISH, Q. C. (with whom was KEMPLAY), for the defendant.¹

The simple question is whether this covenant requires that the lessees shall leave pillars of stone sufficient to enable them to work the stone properly, or sufficient to prevent the surface being interfered with. The latter clearly could not have been intended. It appears from the special case that the demise embraces two separate strata of stone. The top stratum could only be quarried; it could not therefore have been contemplated that the surface was to be preserved uninjured. The object was to compel the lessees to work the stone in a proper manner, so that the lessor might continue it after the expiration of the lease. The power given to the lessees is, to dig, delve, sink for and work the said stone, etc., and to make use of such devices, ways and means as should be found necessary or expedient for working, raising and getting the said stone in the best manner, or as had been usually practiced in such cases in the township of Clayton. And the case expressly finds that in the township of Clayton it is usual to leave pillars of stone, but notwithstanding, the roofs of the mines often fall in, and

¹ The points marked for argument on the part of the defendant were as follows:

"(a) That, upon the facts stated in the case, and regard being had to the provisions of the leases, the lessees were not bound to have left pillars of solid stone of sufficient strength to have supported the roofs of the mines so as to have prevented the subsidence, cracking and giving way of parts of the surface of the closes as stated in the case.

"(b) That, upon the facts stated in the case, it appears that all was done by or on the part of the lessees which was necessary according to the terms of the leases, and that the defendant is not liable for the damages arising from the subsidence, cracking and giving way of the surface of the closes under the circumstances and in the manner stated in the case."

the consequence is that a subsidence of the surface soil in that township often takes place when the bottom stone is being worked.

QUAIN, in reply.—The covenant in question only has reference to the lower stratum. The lease contemplated the working out by the lessees of the whole of the stone; it never could be intended that the lessees should be at liberty to let down the soil. And it was evidently the intention of the parties that the whole of the stone should be worked out by the lessees; for it provides that within two months after the expiration or other sooner determination of the term thereby granted, the lessees shall fill up the pits and shafts and remove and take up all engines, whimsies, cranks and other erections made or erected during the term for the purpose of working the said stone, etc., and remove all the rubbish, etc. (WILLES, J.—There is no proviso to protect the lessor against the sinking of the surface, unless this does it.) None.

ERLE, C. J.

This is an action for breach of a covenant contained in a mining lease, to leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, whereby damage was done to the surface of the land; and the question which has been argued before us is, whether that covenant extends to compel the lessees to leave pillars of stone sufficient to prevent the subsidence of the surface, or is limited to such as might be sufficient to enable the lessees to work the mines in a proper, usual and efficient manner. I am of the opinion that it amounts to a covenant to leave pillars which shall be sufficient to support the roofs so as to prevent the sinking or subsiding of the surface. The indenture purports to be a demise of "all the stone, slate or flag lying and being in and under the surface," etc. It clearly contemplates that the lessees will remove the whole of the stone, etc., during the term. Further there is a proviso for the determination of the lease when all the stone is exhausted. The whole frame of the instrument negatives the notion that the pillars were to be left in order that the lessor might continue the working of the mines, if the lessees gave them up before they were worked

out. Why, then, should the lessor stipulate for pillars to be left to support the roofs? I see no reason, unless it be that the surface might be protected from subsidence. I am fortified in this construction by the part of the lease in which this covenant is found, and also by the covenant for filling up the pits and shafts and removing the engines and machinery, etc., and paying compensation for damage done to the surface when all the working shall have been discontinued. But there is no provision for indemnifying the lessor against injury to the surface by the falling in of the mines, unless it is provided for by this covenant. The injury is of a serious character, for the damage is estimated at £352, and therefore it would naturally be provided for. Upon the whole I have come to the conclusion that the lessees did bind themselves to get and to pay for the whole of the stone, and having done so to restore the surface of the land to a fit state to be used for agricultural purposes.

WILLIAMS, J.—I am of the same opinion. I must say I was much struck by the observation of Mr. Mellish that the covenant in question is found amongst those which relate to the working of the mines in a proper manner, and therefore would seem more naturally to belong to the substrata, and not to the superincumbent surface.

The case finds that, in getting and clearing the stone, the lessees left pillars of the solid stone of sufficient strength to support the roofs of the said mines so far as was requisite for the purposes of working the said mines themselves in a thorough and efficient manner. It would seem therefore that they have done everything that could be required of them, provided the covenant is to be construed in the limited sense suggested by Mr. Mellish. But for the reasons pointed out by my lord, I have, though not without some hesitation, come to the conclusion that the covenant has been broken.

WILLES, J.—I am of the same opinion. During Mr. Mellish's argument, I was inclined to take the same view as my brother Williams at first took. But Mr. Quain's reply has satisfied me that the larger construction for which he has contended is that which we ought to put upon this covenant. It is to be observed that it is found amongst covenants which are framed carefully for the protection of the occupiers of the surface, requiring the lessees, when the mines are no longer worked,

to fill up the pits and shafts, and to remove all incumbrances from the soil, so as to render it fit for being used for agricultural purposes. As the covenant is general in its terms, it must be construed generally. The lessor is not entitled to have the land restored to him with the surface intact, but he is entitled to have pillars of stone left of strength sufficient to sustain the roofs and to prevent the surface being rendered useless to him by subsidence.

KEATING, J.—I am of the same opinion. It was the clear intention of the contracting parties that sufficient pillars of stone should be left to protect the surface from the effects of subsidence. Mr. Mellish's construction would entirely deprive the lessor of the advantage of a covenant which was evidently inserted for his exclusive benefit. He says the object was that the mines should be left in such a state that the lessor might continue to work them if he thought fit. Mr. Quain effectually answered that by showing that by the terms of the lease the whole of the stone was to be worked out by the lessees, and the pits and shafts to be filled up, and all obstructions removed from the surface. The intention of the covenant was that the surface should be protected from being destroyed by the total removal of its natural support; and that covenant has clearly been violated by the defendant.

Judgment for the plaintiff.

CLEGG V. ROWLAND.

(Law Reports, 2 Eq. 160. Before the Vice Chancellor, 1866.)

When lessee may or may not work mines. A lease of land, without mentioning mines, will entitle the lessee to work open, but not unopened, mines. If there be open mines, a lease of land with the mines therein will not extend to unopened mines; but if there be no open mines, a lease of land, together with all mines therein, will enable the lessee to open new mines.

Application of the rule. Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years, *without mentioning mines or mining leases*: Held, that the trustees had no power to grant leases of unopened mines.

By a settlement made upon the marriage of Brierly Rowland and Charlotte Rowland, then Charlotte Clegg, and dated the 22d of May, 1833, Charlotte Rowland conveyed to J. Whittaker and J. Fallowfield, their heirs and assigns, among other hereditaments, one undivided moiety of certain messuages or dwelling-houses, cottages, closes, fields, pieces or parcels of land and hereditaments, in Oldham, devised to the said Charlotte Rowland by the will of her father; and also of and in certain yearly chief rents issuing out of the said hereditaments, together with the mines, minerals and quarries thereunder, and the appurtenances thereto belonging, to hold the same upon trust to pay the rent and proceeds thereof to Charlotte Rowland during the joint lives of herself and Brierly Rowland, but not by way of anticipation, for her separate use, and after the death of either of them, then to the survivor for life, and after the death of the survivor, then upon certain limitations for the benefit of children, and in default of children then the property was to be in trust for and to be conveyed and paid to such person or persons for such estate and estates as Charlotte Rowland should by will appoint, and in default of appointment, upon certain trusts therein expressed. The settlement contained a power of leasing in the following words: "Provided always, and it is hereby further declared and agreed that it shall be lawful for the trustees at any time or times whilst this moiety shall remain vested in them under the trusts of these presents, and during the joint lives of Brierly Rowland and Charlotte, his wife, with their joint consent and approbation in writing, and after the decease of either of them, then with the consent and approbation of such survivor, to demise and lease all or any part of the said moiety of the said hereditaments, lands, and other premises, granted, released, and assigned for any term or number of years not exceeding fourteen years in possession, but not in reversion or by way of future interest, so as upon every such demise or lease there be reserved and made payable during the continuance thereof respectively, to be incident to and go along with the reversion expectant on the same, the best and most improved yearly rent or rents that can be reasonably had or gotten for the same, without any sum or sums of money being taken by way of fines in respect of such de-

mises or leases, and so as none of the said demises or leases be made dispunishable of waste by any express words therein, and so as in every such demise or lease there be a clause of re-entry on non-payment of the rent or rents to be thereby reserved." The settlement contained no express power of granting mining leases.

On the first of September, 1834, being about a year and a half after the marriage, a lease was made between Brierly Rowland and Charlotte Rowland of the first part, the trustees of the settlement of the second part, Mary Anne Clegg (the sister of Charlotte Rowland, and the owner of the other undivided moiety of all the premises) of the third part, Humphrey Nicholls of the fourth part, and James Stopherd and Thomas Brideoake (the lessees) of the fifth part. By that lease two mines of coal, known as the Higher and Lower Bent Mines, and also a mine known as the Black Mine, lying under certain parts of the premises comprised in the above settlement, were demised by the trustees, with the privity and approbation of Brierly Rowland and his wife, and by Mary Anne Clegg, to J. Stopherd and T. Brideoake for ten years, subject to a fixed or tie-rent of £100 per annum, and certain royalties therein specified, and with various reservations not necessary to be specified.

Of the mines comprised in the lease, the Higher and Lower Bent mine had never been worked. The Black mine had been worked, but the working had been abandoned for some time, and it was now an open mine.

One moiety of the rents and royalties reserved by the lease were received from time to time by Brierly Rowland under a belief that he was entitled to them, and he applied them to his own use. This went on till his death. There were no children of the marriage. The wife survived and she made a will by which she appointed the premises to persons who were now represented by the plaintiffs.

The bill was filed against the legal representatives of Brierly Rowland, and also against John Rowland, the elder, who was a substituted trustee under the settlement three years and a half after the date of the lease, and it prayed that it might be declared that Brierly Rowland was, at the time of his death, liable to account to the trustees for the time

being of the settlement for the various sums received by him in respect of such mining lease, and that his estate was now liable to account for and pay to the plaintiffs, as the executors and trustees of the will of Charlotte Rowland, the said principal sums, together with interest thereon from the time they were received; and the bill prayed that the defendant, John Rowland, the elder, as the surviving trustee of the settlement, might be declared liable for and ordered to pay to the plaintiffs such of the several principal sums as were received by Brierly Rowland, with the privity of the defendant, John Rowland.

To this bill the defendants demurred.

BAILY, Q. C., GLASSE, Q. C. and JOLLIFFE, for the demurrer.

OSBORNE, Q. C. and KARSLAKE, in support of the bill.

Sir R. T. KINDERSLEY, V. C., after stating the facts of the case, continued:

In considering the question, what was the effect of the power contained in the settlement, this principle must be borne in mind, that if there be open mines and unopened mines on the same land, belonging to an owner in fee, if the owner grants a lease of that land, whether the mines be expressly included in the lease or not, the lessee may work the opened mines, but he is not justified in opening an unopened mine. That is laid down by Lord Coke very explicitly (Co. Litt. 54b). He says: "A man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or years; the lessees for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he can not dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine. But if there be no open mine and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof; otherwise those words should be void."

The ground of the law thus clearly laid down by Lord Coke must of course be, that where there are an open mine

and an unopened mine, unless the lease contains an express authority to work the unopened mine, it must be assumed to have been the intention of the parties that the lessee should not open the unopened mine.

That is very clear. It is true that in the present case the question is not what is the construction of a lease, but what is to be the construction of the power to grant leases? But if it be a sound doctrine that a lease by an owner in fee of the land and the mines, there being an open and an unopened mine, does not justify the lessee in opening the unopened mine, then it appears to me that a power to make a lease of the land and mines (even mentioning mines), ought to be construed only to authorize the granting of a lease, so as to entitle the lessee to work the open mines, and not to entitle him to work the unopened mines. That, I think, is a legitimate and reasonable, I might almost say a necessary corollary from the proposition of law laid down by Lord Coke. It will be observed that that view proceeds on the supposition that in the power not only the lands and hereditaments, but mines, were specifically mentioned. But in the present case the power does not specifically mention mines at all. It is true that mines and minerals are mentioned in the description of the property conveyed, and the power mentions the hereditaments, lands and other premises before conveyed, which words are large enough to comprise the mines.

But the power is in form the ordinary leasing power to enable the granting of leases of land for fourteen years; and not only are there none of the usual provisions applicable to leases of mines, but there is the express provision that none of the demises or leases be made dispenishable of waste. This is not very accurate language, but of course it must mean that the lessees are not to be dispenishable for waste; and it is justly said by the plaintiffs that the opening of an unopened mine is in itself waste. And no doubt opening an unopened mine by a tenant for life, or lessee, who has no special authority to open it, is waste as between him and the remainder-man or reversioner. If he had such authority it might be questioned whether his doing so would be properly termed waste; but that is perhaps rather a question of words than of substance. In the case before the master of the

rolls, where he interpreted the power to be an express power to grant leases to work unopened as well as opened mines, there followed the clause that the lessee was not to be made punishable of waste. It might perhaps have been suggested that the meaning of the clause prohibiting waste was that the lessee was to be restricted to the customary and workmanlike mode of working the mines, whether already opened or not, so as not to injure the mine for future working or prejudice the reversioner. But that would be a forced construction of the clause. It is no doubt waste for a lessee to open an unopened mine. The master of the rolls looked at it in that point of view. He considered that the terms of the prohibition were such as to prevent the lessee from committing waste—that is, from opening an unopened mine; and being of opinion that the terms of the power were such as expressly to authorize the working of unopened mines, he came to the conclusion that there was so much contradiction in the clause which imported a prohibition against waste that he rejected the clause altogether. That case is a strong authority for this proposition—that such a clause is inconsistent with a power to work unopened mines; and therefore the existence of that clause in the present case appears to me to afford a strong argument for holding that this power was not intended to authorize the granting of a lease of any unopened mines.

I am of opinion that this lease was invalid so far as it authorized the opening of a new mine, and that therefore the demurrer of the representatives of Brierly Rowland must be overruled.

The other demurrer is by John Rowland, the elder, who became a trustee two or three years after the granting of the lease; and it is contended that he ought himself to have received the rents and accumulated them. It is insisted that his acquiescence has made him liable. I do not see any ground for that. There is, in fact, nothing to show that he knew anything of the lease. It was done by Brierly Rowland and the then trustees. Brierly Rowland went on receiving the rents and it does not appear that the trustees ever received any of them. There is no ground for holding that John Rowland is liable for want of diligence in the execution of the trusts, and therefore his demurrer must be allowed.

ALDERSON V. ENNOR.

(45 Illinois, 128. Supreme Court, 1867.)

¹ **Waiver of trespass.** Where mineral has been taken by trespass and converted into money the *tort* may be waived and assumpsit brought for the proceeds.

An action for money had and received may be maintained whenever defendant has obtained the money of the plaintiff which in equity and good conscience he ought not to retain; nor need he have received such money as the plaintiff's agent.

² **Customary royalty.** It is a custom in the Jo Daviess lead mining district for miners, mining on land without any agreement, to pay a royalty of one sixth of the mineral raised.

Facts of the case. Plaintiff and defendant owned adjoining mineral lands. A. went upon the land of defendant, sank a shaft and drifted into the ground of plaintiff and sold the mineral raised from plaintiff's land to the defendant, without retaining any royalty for the plaintiff. The mining was by permission of both owners. It was a proved custom in that locality for the ore buyer, at least if a smelter, to retain the royalty due the owner of the land. *Held*, that even if defendant were not a smelter, there was such privity between the parties as would create a liability and that A. should be treated as the agent of the plaintiff in the sale of the mineral to the defendant.

Instructions not based on evidence. There is no error in refusing instructions not based upon the evidence in the case.

Appeal from Jo Daviess. HON. BENJAMIN R. SHELDON, J.

D. W. JACKSON, for appellant.

A. L. CUMMINGS, for appellee.

BREESE, C. J.

This was an action of assumpsit on the common counts brought to Jo Daviess Circuit Court by William Ennor against Samuel Alderson, and a verdict and judgment for the plaintiff.

To reverse this judgment the record is brought here by appeal.

¹ *Hawesville v. Hawes*, 7 M. R. 193; *Dundas v. Muhlenberg*, 35 Pa. St. 351; *Post TRESPASS*. See *Tabor v. Big Pittsburg Co.*, 14 Fed. 636.

² *Allen v. Burdley*, 1 Sp. Eq. 264; *Post TEN. COM.*

The only point made here is upon the instructions given to the jury.

The case was briefly this: Plaintiff and defendant were owners of adjoining tracts of land in the lead mine region not separated by any visible line. The defendant was also a joint owner with one Williams, of land adjoining his land on the east.

It is the custom prevailing in that locality, that miners mining on land without making any agreement, will pay a royalty or rent of one sixth of the mineral raised to the owner of the fee. Under this custom Dougherty and Beggins went upon defendant's land and sank a shaft sixty feet deep and drifted west toward the land of the plaintiff. The plaintiff staked out what he supposed to be the dividing line between his land and the defendant's, and told the miners to pay the royalty according to that line.

After the miners had drifted west to that line, they went over to the land of plaintiff, by his permission, and sank a shaft about ten feet west of the line so staked out, and then drifted east to intercept the drift extending west on the land of the defendant.

The defendant being dissatisfied with the line so staked by the plaintiff, in July, 1865, employed the surveyor to run the line, and he found what he considered the true line to be thirty-seven and sixty-two one hundredths feet west from the plaintiff's shaft, and that the plaintiff, in staking the line, had made a mistake against himself of more than twenty-seven feet. In the fall before this line was run, the miners sold to defendant 5,220 pounds of mineral at \$100 per thousand pounds, which came from the land between the line run by the surveyor and the line staked by the plaintiff. The teams of one Combellick came with an order from defendant, and took the mineral away, and Combellick afterward paid the miners the amount coming to them.

The value of this mineral in cash was \$522, one sixth of which, \$87, was the claim of the plaintiff as rent, and which the defendant received and refused to pay over to the plaintiff. For this the action was brought and a recovery had of \$87.

The instruction given for the plaintiff to which the defend-

ant excepted was as follows: "If the jury believe from the evidence that the witnesses, Dougherty and Beggins, raised 5,220 pounds of mineral from the land of the plaintiff and sold and delivered the same to the defendant as a smelter at \$100 per thousand, and that he retained in his hands the one sixth of said mineral as rent, and has converted the same into money, then in that case, unless he has shown that he has paid the same out in good faith to some other party claiming the same, the jury are authorized to find for the plaintiff the amount of money so received by the defendant for such mineral."

Appellant, in his objection to this instruction, gives us interesting information in regard to the manner in which this sort of mining is conducted in the mineral region of our State. He says the greater portion of the mineral there raised is raised by individuals or associations on the lands of others; that parties desiring to mine usually make an arrangement with the owner of the land to go upon it and dig for mineral, paying a portion, varying from one fourth to one tenth of the amount raised, to the owner, for the privilege. The mineral is usually sold by the miner to the smelters, though not always, and by the act of 1831, of the general assembly, the miner in selling is obliged to disclose to the purchaser where the mineral was obtained. At the time of the sale the miner usually discloses what portion of the mineral he has agreed to pay as royalty, or rent, for the privilege of mining, and this royalty is deducted from the amount coming to the miner for the mineral, and is retained by the smelter for the owner of the fee. To do this there is no legal obligation, but it is customary. He says there are many exceptions to this rule.

He then insists that this instruction submits it as a question of fact in issue, whether the defendant purchased these 5,220 pounds of mineral "as a smelter" and, in accordance with the custom of doing business in the lead mine region, retained the royalty of the land owner and refused to pay it over to him on demand; and as there was no evidence the defendant purchased the mineral as a smelter, the instruction submitting that question to them was improper. Whatever may be the import of the words, and with the explanation

given, the instruction itself establishes the fact that the question submitted to the jury was whether the purchase was made in the manner in which purchases are usually made by smelters; and he insists that the instruction, so worded, actually misled the jury as to the issue.

By the appellant's own showing, purchases of mineral are not always made by smelters, for he says "not unfrequently," which means "very often," parties other than smelters purchase mineral, in which case they do not assume to retain the royalty. We conceive it makes but slight if any difference, whether the party buying the mineral assumes to retain the royalty or not, if he does, in fact, retain it; and that is the gravamen of this action, that the defendant, in fact, retained the royalty and converted it into money, which he refuses to pay over to the person entitled. If the defendant received the property of plaintiff and converted it into money he ought to be liable to the plaintiff for the proceeds in whatever character he received it. It is therefore wholly immaterial whether he received it as a smelter or in some other character; the obligation rests upon him to pay over the proceeds to whomsoever they may belong. Rejecting the words "as a smelter" as surplusage, the instruction is sensible and announces the correct rule of law applicable to the case; for if the mineral was obtained by a trespass and has been converted into money, the trespass may be waived and assumpsit brought for the proceeds. The action is for money had and received, in which action, if the plaintiff shows the defendant has received money belonging to the plaintiff, which *ex aequo, et bono*, he ought not to retain, the plaintiff must recover: *Taylor v. Taylor*, 20 Ill. 650. There is a clear obligation resting upon the defendant to pay this rent over to the plaintiff, as the mineral he bought of Dougherty and Beggins was taken from the land of the plaintiff.

That the rent of one sixth was paid to the defendant seems quite probable from the testimony, for defendant claimed it, and Combellick, when he hauled away the mineral, paid only the miners their share. From the fact that Combellick hauled away the mineral on an order from the defendant, paying the miners their share only, the jury had the right to infer that defendant had sold the mineral to Combellick, and thereby

converted it into money, and for this the action lies: *Dickinson v. Whitney*, 4 Gilm. 406.

The defendant's first instruction was properly refused, for the reason that it was wholly immaterial to the plaintiff how or for what the defendant and Childs accounted, or how they arranged their respective claims; the question for the jury was, had defendant money of the plaintiff which he ought not to retain?

The second instruction of defendant refused was not based upon any evidence in the cause, for there was no dispute about the ownership of these lands at any time.

Nor is there any evidence to support the third instruction refused. There was no claim of ownership litigated or in evidence before the jury. The simple question was, did defendant receive and retain rent belonging to plaintiff for the use of his land for mining purposes?

The fourth instruction presents a different view of the case. It is this: "The jury are instructed, as the law of this case, that if they believe from the evidence that the defendant received rent of the plaintiff's mineral land, the defendant is not liable in this action, unless they also find that the defendant received those rents as the agent of the plaintiff."

We do not perceive the force of this instruction. Is it intended to lay down the law that in no case will this action lie unless the plaintiff shall prove the defendant, in receiving rent or money, acted as the plaintiff's agent? If the law is so in this case it must be so in every case, which, it is well understood, it is not. If the instruction was designed to raise the question of privity, in order to bring the case within the authority of the case of *Trumbull v. Campbell*, 3 Gilm. 502, and *Hall v. Carpen*, 27 Ill. 386, and *Carpen v. Hall*, 29 Id. 512, it was proper so to raise it.

But was there not privity between these parties? By the admissions of appellant's counsel, the miners are accustomed to sell the mineral raised, the buyer, if a smelter, retaining the rent to be paid over to the owner of the land. The miners, therefore, may be considered the agents of the landowners in the sale of this mineral to the defendant, hence privity; and as it is clearly proved the defendant has not paid it over to the plaintiff, this action is well brought, and the plaintiff

ought to recover. As to the fifth instruction, it was properly refused, for Alderson and Child had no right to receive and appropriate to their use the money or property of the plaintiff.

There being no error in the record, the judgment is affirmed.

Judgment affirmed.

POWELL V. BURROUGHS ET AL.

(54 Pennsylvania State, 329. Supreme Court, 1867.)

¹ Settlements, no discharge. In a lease of a coal mine, the lessee stipulated that he would pay a rent for coal taken out and also mine a certain number of tons annually: *Held*, that settlements for coal taken out were not a discharge of a breach in not taking out the stipulated quantity.

Covenants distinguished. The covenant for rent for coal mined is distinct from the covenant to mine a certain quantity.

Lessee working one mine in disregard of another. Two mines belonging to the same lessors, the one contiguous to the other, were leased by two leases to one lessee. One stipulation in each lease was that the lessee was not bound to mine more coal than could be taken away by cars furnished by a railroad company named. It was no excuse for not working one mine that the cars furnished were not sufficient to take away the coal mined in the other.

² Increased value of coal left. That the coal which the lessee failed to take out according to his covenant was of greater value to the lessor at the end of the lease than if it had been taken out, is not a ground for reducing the claim for the breach to nominal damages.

Coal rent as liquidated damages. The rent per ton agreed for was stipulated damages to the extent of the non-performance. The uncertainty as to the extent of the injury is a criterion to determine whether it is a penalty or liquidated damages.

Error to the District Court of Philadelphia.

This was an action of covenant to September Term, 1865, by H. N. Burroughs, W. P. Orbison and W. Dorrance, Jr., against Robert H. Powell, to recover rent.

¹ Compare *Wyoming Co. v. Price*, 81 Pa. St. 156; *Skillingford v. Good* 95 Pa. St. 25.

² Compare *Wheatley v. Westminster Co.*, 8 M. R. 553.

On the 22d of February, 1860, the plaintiffs leased to the defendant the right to mine and take away coal from their mines, called the "Barnet Coal Bank," in Huntingdon county, from the 29th of that month until the 31st of December, 1864, the defendant reserving the right to terminate the lease on the 31st of December or in any year thereafter on three months' notice, and to pay 20 cents per ton of 2,240 lbs. for all the coal mined and carried away; the defendant, on the 8th of the next April and on the 8th of each succeeding month, to give his promissory note, payable in ninety days, for the amount of the coal taken by him during the preceding month; he also bound himself to mine at least 33,334 tons of 2,000 lbs. before the 1st of Jannary following, and thereafter 40,000 tons per annum during the lease, provided by all proper means the mines will produce so much. "But if he shall not use the necessary means, efforts and exertion in working said mine or vein of coal, and shall in consequence thereof fail to mine and take away the said quantity, he shall, notwithstanding, pay to the said party of the first part the same amount of rent as if he had mined and taken away the quantity of coal as before specified. If the amount stipulated annually to be taken out be not taken out, under circumstances which will not excuse the said lessee from doing so, and which will require him to pay the rent therefor, he shall have the privilege of taking out the deficiency in the rent of any succeeding year of this lease, without again paying rental for the same; said deficiency not to be computed as part of the amount required to be taken out by the lessee in the succeeding year." It was further stipulated that if the Huntingdon and Broad Top Railroad Company did not furnish cars, so that the lessee could not take away the quantity specified in the time specified, there should be a proportionate abatement of rent, unless he should have failed to use proper diligence to procure or be in other default with regard to them. It was also stipulated that the lessee should not be compelled to go to an expense unusual in the ordinary process of mining. There were numerous other covenants in the lease not bearing on the questions arising in this case.

On the 25th of March, 1862, the plaintiffs made another lease to the defendant of the right, etc., of "mining and taking

away coal from the new opening on the tract of land owned, etc., * * * called the Burroughs vein, the same being about 75 feet under the Barnet vein on said tract, until the 31st of December, 1864, reserving a rent of 20 cents per ton of 2,240 lbs., to be secured and paid in the same manner as is provided in a lease between same parties, dated the 22d day of February, 1860, the rent to be ascertained as therein provided.

"This lease to be subject to all the provisions contained in the said former lease, so far as applicable, with like effect as though the same had been incorporated in this one, with this exception, that the said party of the second part shall not be required to take out of the Burroughs vein more than 12,000 net tons during 1862, 25,000 net tons during 1863, and 30,000 net tons during 1864."

The plaintiffs in their declaration averred that the defendant did not mine and carry away the amount of coal stipulated for in the years 1862, 1863 and 1864, and pay for the coal at the rate mentioned in the lease.

The defendant pleaded: 1. That he could not get out the quantity of coal stipulated for, because the railroad company, without any default on his part, did not furnish cars; that under the rules of the railroad company a certain number of cars only could be obtained for any one colliery. 2. That all the cars that could be obtained for the Barnet and Burroughs collieries were used for the Barnet colliery, and that there was therefore a greater quantity of coal taken from that colliery than could have been taken from both collieries if all the cars had been divided between them, and that there consequently became due for the rent of the one colliery more rent than if both had been worked and all the cars which could be obtained had been used to carry it away. 3. That by reason of the railroad company neglecting to furnish cars, he could not mine and take away coal "except at a cost and expense unusual in the ordinary process of mining." 4. That by the contract between the parties it was stipulated that the defendants should not be obliged to pay more to miners than he was paying at the making of the contract; that such stipulation was intended by both parties to be put into the agreement, and that he executed the lease supposing it to have been inserted, and that it was impossi-

ble, by reason of the failure of the company to furnish cars and of the land being more difficult to work, to obtain miners, unless at a higher rate than he was paying at his own mines, and that he was therefore excused from paying the rent. 5. That the coal which he would have mined remained in the land, which was therefore increased in value above what it would have been had the coal been mined, and he was therefore liable only to nominal damages. 6. That he held the Barnet mine at a better rent than the Burroughs mine; and that the Barnet mine was capable of employing more miners than could mine in it and in the Burroughs mine; all the coal was mined which could be carried away by the cars furnished; and, alleging also matters in the other pleas, averred that he was excused from performing his covenants.

Much evidence was given by the defendant in support of his pleas.

He also submitted the following points:

1. If the plaintiffs, or any of them, dispensed with the working of the Burroughs vein, they can not recover for any failure to mine after that event.

2. The facts which existed and continued at the time of such dispensation are sufficient grounds for the waiver of the past non-performance up to that time.

3. Settlements at the end of the year, for the rent of the past year, without an exaction of the rent for coal taken out, taken in connection with the stipulation in the 3d clause of the lease in reference to the right to mine such coal in any subsequent year, are a discharge from all liability for rent on coal taken out at that time.

4. If the failure to mine was caused by the neglect, refusal or failure of the Huntingdon and Broad Top Railroad Company to furnish cars to carry away the coal, and this failure was not caused by the default of the defendant, then the defendant is excused from his covenants to mine and pay rent.

5. If the jury believe that these two mines—the Burroughs and the Barnet—were counted in the distribution of cars as *one*, and there was an insufficiency of cars furnished to carry away the coal from the mines together, and all the coal was mined that could be got out with the cars furnished by the

railroad company, then the defendant is not liable for any rent upon coal not taken out.

6. If the defendant used all proper means, efforts and exertions to mine the coal from both or either mines, and could not by such means and the supply of cars furnished by the railroad company obtain more coal from both mines together than he did, then the plaintiffs can not recover.

7. If every reasonable exertion was made by defendant to obtain miners, and no men could have been obtained by any exertions which a prudent miner could have made in his own case, and all the coal was got out from one or both mines that could have been by the efforts of such miners, then the defendant is not liable for the failure to mine more coal, nor liable to rent on that deficiency.

8. If all the means at the defendant's command to obtain coal from those two mines were employed on the Barnet vein, and thereby as much rent obtained and paid plaintiffs as if the means had been divided between the two mines, then the plaintiffs have no cause of action.

9. If, under the circumstances set forth in the 8th point, the court think there is a cause of action, the court is requested to instruct the jury that no more than nominal damages can be recovered.

10. If the jury believe that the coal in the mine was worth a greater rent at the termination of the defendant's lease than the defendant stipulated to be paid, then there can be no recovery beyond nominal damages.

The court, STROUD, J., affirmed the 1st and 4th points and refused the others; and also charged the jury to examine each of the pleas and ascertain from the evidence whether or not the plea was sustained, and as in this way they should come to a conclusion, they should find their verdict on each issue.

The judge also said, "What would have been the use of putting in the claim for the Burroughs vein in the bill for rent, when both knew that it was not being worked?"

The verdict was for the plaintiffs for \$5,514.81.

The defendant took a writ of error. His assignments were that the court erred—

5. In refusing to affirm his 3d point.

6. In saying to the jury, "What would have been the use

of putting in the claim on the Burroughs vein in the bill for rent, when both knew it was not being worked?"

7, 8, 9, 10 and 11. In refusing to affirm the 5th, 6th, 8th, 9th and 10th points respectively.

R. C. MoMURTRIE, for plaintiff in error, cited *Jegon v. Vivian*, 1 Law Rep. 34; *Lyon v. Miller*, 12 Harris, 392.

G. JUNKIN, Jr., for defendant in error, cited Chitty on Contracts 339; 4 Burr. 2, 229; *Young v. White*, 5 Watts 460.

The opinion of the court was delivered March 11, 1867, by THOMPSON, J.

No argument has been submitted in support of the first three assignments of error, for the reason, as we learn from the defendant in error, and not denied, that the testimony of which they were predicated was eventually received; we must, therefore, treat them as abandoned. The matter constituting the fourth assignment, in which it is alleged the learned judge erred in not affirming, is insensible as it stands on the paper-book, and need not be noticed. Possibly some mistake may have occurred in framing this assignment.

The plaintiffs declared for a breach of the covenants in the lease of the Burroughs coal vein in their lands, dated the 20th of March, 1832, and to continue to the 1st of June, 1865. The principal breach was for the non-payment of rent, resulting from the failure to mine or raise the stipulated number of tons of coal each and every year during the continuance of the lease. To the counts containing the breaches, the defendant pleaded specially eleven distinct pleas, but on the trial withdrew five of them. The matters put in issue by the remaining pleas were—

1st. That owing to the default of the railroad company in not providing sufficient cars the defendant could not get out the stipulated number of tons.

2d. That there being two mines leased by the plaintiffs to the defendants, all the cars that could be obtained for both were used in one, by which a greater rent accrued to the plaintiffs than could have done if both had been worked.

3d. That defendant was only bound to mine so much coal as he could ship by the cars furnished, using due diligence and not incurring unusual expense, and that he did use such diligence, but for want of cars could not ship except at an unusual expense.

4th. That the coal remaining unmined at the end of the term increased the value of the land beyond the amount demanded for rent.

5th. That the defendant was the plaintiffs' tenant of an adjoining mine yielding a better rent and which could furnish more coal than the cars to be had could carry; that he was not bound to mine coal excepting such as could be transported, and that by reason of insufficiency of cars, all the miners that could be employed in both mines were used in one, and if they or any of them had been employed in the other the production and rents would have been diminished; and that he used all efforts to obtain cars.

6th. An additional plea (the 12th), embodying in substance in one plea the whole of the foregoing and nothing else.

These pleas were all found against the defendant, and we are now to determine how far the answers of the judge to the points of the defendant were applicable to the pleas, and whether they were rightly answered when applicable.

The 5th assignment is that the learned judge refused to charge that a settlement for the rent of the past year, without exacting rent for coal not mined according to the terms of the lease, was a discharge from liability on the covenant to mine a certain number of tons per annum, or in default to mine to pay the rent as if mined. In other words that it was a release *pro tanto*. The learned judge refused to respond as requested, and we agree he was entirely right in doing so. It was quite too much to affirm as a conclusion of law, that settlements for coal taken out were a discharge of all liability for a breach of the contract to take out a defined number of tons. The covenant to pay rent for the coal mined and taken away was distinct from the covenant to mine a certain number of tons. Receiving a stipulated sum for the one was not necessarily a release of the other. The 6th assignment of error is in the same category with the error just noticed. What is

complained of in these errors was in fact not applicable to either of the pleas.

The 7th assignment is to the refusal of the learned judge to charge as requested in the defendant's 5th point, which was in substance, that if both the mines leased by the defendant from the plaintiffs were counted in the distribution of cars as one, and there was an insufficiency of cars to convey away the coal from both, and all the coal was mined from one that could be got away by the cars furnished by the railroad company, the defendant was not liable for any rent upon coal not taken out. The argument of the counsel for the plaintiffs in error admits that the learned judge did instruct the jury that if, after proper exertions used to obtain cars were made by the defendant, and he failed, he would be excused. But the alleged error in the instruction was that the judge was of opinion, and told the jury, that the defendant had failed in his proof, because more men were not put to work in the Burroughs vein, so as to entitle it to its proportion as an independent mine, which it seemed to him it was. The accumulation of men in the one mine did not enlarge the proportion of cars of that mine. Whereas if the other had been actively worked it would have had its proportion of cars without regard to the proportions of the first. This, we understand, was substantially the instruction given, and as the bill of exception shows that the pleas were read to the jury with a reference of the facts applicable to them, we see no error in this treatment of such as were applicable to the 6th plea. The error of the argument is in confining the operations under these distinct leases as if there were but one lease and one coal mine. Whereas the mines were distinct, although on the same land; and the leases were as distinct as if in different ownerships, having different openings, gangways, car-stands and machinery, rendering different amounts of rent and under different covenants in one or more particulars. The learned judge held the defendant bound to make his exertions with reference to the covenants in the lease of the Burroughs vein, and it was referred to the jury to say whether he did or not. The whole effort of the defendant was to show that he could not get cars enough to carry all the coal from the Barnett mine. It is manifest he could not increase its proportion.

His fault lay in not working the Burroughs vein so as to entitle him to its proportion according to the number of miners employed. As the leases were distinct, the lessee was bound to treat his covenants as distinct. He had no right to set up his own judgment and decide that it was better for the plaintiffs that all his forces should be applied to the Barnet mine, because it afforded the greatest facility for taking out coal. That was not his covenant and not a matter for him to determine, and the learned judge, we think, was right in keeping the covenants and performance under these leases entirely separate. These remarks are equally applicable to the 8th and 9th assignments of error.

The 10th and 11th assignments may be considered together. The one is an amplification of the other; or rather the latter is an explanation of the former, and is, "that if the jury believe that the coal in the mine was worth a greater rent at the termination of the defendant's lease than the defendant stipulated to pay, then there can be no recovery beyond nominal damages."

Had this instruction been granted it would have directly sustained the defendant's 10th plea. We are therefore to determine whether it was error to refuse it or not.

It can hardly be said that this plea was a ground of defense at law for a breach of the covenants sued on. It does not aver performance in any shape, nor does it show that it was contrary to law that it should be performed. If it be a plea at all, it is an equitable plea or defense. It says to the plaintiff: true it is I entered into the covenants for the breach of which I am sued, and did commit the breaches charged, but it was better for you that I did. You now get more for your coal than I agreed to give you. You are therefore entitled to nominal damages only. Such equity, it is apparent, rests not on any merit in the party claiming it, but arises exclusively in his bad faith in not regarding his covenants. There is no such principle in equity as this. If sanctioned it would be a panacea to heal every broken covenant where performance was stipulated for. The defendant had three alternatives, either of two of which would have relieved him from all damages; namely, the performance of his covenants as they were written, or showing that they were

dispensed with by some inability to perform provided against in the lease; the third, to terminate the lease at the end of any year on giving the notice required, and this would have released him from liability for any breach but for the past year. He chose to do neither, and now claims to show that he has done better for the plaintiffs by keeping their coal in place for a higher price. This policy, if taken in time and extended, might have covered the entire coal region, and but a single mine might have been worked. Competition thus set at defiance would undoubtedly be profitable to such a lessee, if, when called on to answer in damages to other lessors for broken covenants, he might successfully defend himself by showing that there were parties who had given, or were willing to give, higher prices for the unmined coal than he had contracted to give. If he could do this he might be fairly entitled to stand acquitted of damages and to have the credit of a discovery!

The defendant covenanted to take out of the Burroughs mine, leased in 1892, without any reference to any other mine or lease, so many tons per year, while the term lasted; and on failure to take them out, to pay for the stipulated number taken or not taken. The number of tons to be taken or paid for was the moving consideration for the lease, and must be so regarded. It was, therefore, a clear case of stipulated damages in case of non-performance or non-performance *pro tanto*. The parties fixed it as the true measure of damages in case of failure, "without reference to the extent of the injury that might ensue by non-performance," and, so far as the covenant is concerned, are bound by it. The uncertainty as to the extent of the injury which may ensue is a criterion by which to determine whether it is a case of liquidated damages or a penalty: Chitty on Cont. 763, 766.

Pearson v. Williams, 26 Wend. 630, is a case somewhat in point. A purchaser of certain city lots, in consideration of a conveyance of them for a certain sum of money, covenanted that he would, by a certain time mentioned, erect thereon two brick houses of specified dimensions, or in default pay on demand to the grantor \$1,000. It was held that this was a case of liquidated damages, it being evident that the covenant to erect the houses was part consideration for the sale. See also

Dakin v. Williams, 17 Wend. 447; and the same case, 22 Id. 201. Perhaps more directly in point with the case before us is *Young v. White*, 5 Watts, 460. There it was a contract to have a canal boat built and ready for the spring trade—1st of March—or on a failure to pay \$10 a day to the other party. This sum was held to be liquidated damages. The number of days during which there might be a failure was uncertain, hence the parties agreed on damages for each day. So here the number of tons which might be short of the number agreed to be taken out was also uncertain, and like the case of the boats the damages were fixed to meet the deficiency at so much per ton. These cases are hardly distinguishable in principle. But we forbear to enlarge; we are of opinion that the defendant was bound by his covenant to pay for the coal not mined so far as he was not released from the same. Seeing nothing to correct, *the judgment is affirmed.*

CRAWFORD & MURRAY V. WICK.

(18 Ohio State, 190. Supreme Court, 1868.)

Parol contract to change written lease—Statute of Frauds. By a parol contract between the parties to a coal lease, the lessor agreed to forbear to enforce an accrued forfeiture and to permit the lessees to continue to work the demised premises and also to relinquish all claim for damages on account of the non-performance of a certain store contract which was supplemental to the lease. In consideration thereof the lessees agreed to pay three cents per ton on all coal already mined and four cents per ton on all coal thereafter to be mined under said lease, in addition to the payments stipulated for in the lease. The lessees continued to work in accordance with the terms of the original lease, and their possession was as well referable to the written as to the supplemental parol lease. In an action for damages for breach of the parol lease: *Held*, that not being in writing it was clearly within the Statute of Frauds, and there was no such performance as to take it out of the statute.

Store contract in restraint of trade. The lessee of a coal mine agreed with the lessor, by a supplemental contract, that he would use all his influence in a reasonable and proper manner to have all his employees and their families do their entire trading at the store of the lessor, and that the lessee would not accept, receive or pay any order drawn upon

¹ *Beecher v. Dacey*, 45 Mich. 92.

him in favor of any other store by such employes, nor give any such order, note or evidence of indebtedness to be transferred to any other store for goods, etc.: *Held*, to be a contract in restraint of trade, which tended to unwarrantable monopoly and extortion.

Release of uncollectible claim, no consideration. The release of a claim for damages upon alleged breach of an unlawful covenant, reserved against a coal lessee, is not a valid consideration for a new contract.

Error to the Common Pleas of Mahoning County. Reserved in the district court.

The case is sufficiently stated in the opinion of the court.

F. E. HUTCHINS and WILLEY & CARY and B. F. HOFFMAN,
for plaintiffs in error.

M. BIRCHARD and C. E. GLIDDEN, for defendant in error.

BEINKERHOFF, J.

This is a petition in error filed in the district court and reserved for decision here, by which it is sought to reverse a judgment of the court of common pleas. The plaintiffs in error were defendants below, and the defendant in error was plaintiff below.

The petition in the original case is very far from being a model of that clearness and conciseness of statement which the code of civil procedure prescribes, but we gather from it that the plaintiff below, Wick, with several other parties who were owners in common with him of fractional portions of certain coal lands, on the 15th of June, 1885, executed to one Arms a lease of such coal lands, with certain mining rights and privileges therein specified, for the term of twenty-five years, giving the right of immediate possession and recognizing the right of the lessee to assign his term under the lease.

It does not appear that anything was done under the lease by Arms, the lessee; but on April 17, 1886, he sold and assigned the lease and term to Crawford & Murray, the plaintiffs in error, who thereby covenanted with said lessee to perform his covenants in the lease; and thereupon Crawford & Murray went into possession of the demised premises and

continued to hold the same and mine coal therefrom until long after the making of the alleged verbal contract hereafter mentioned and on which this suit is brought.

The petition also shows that contemporaneously with the execution of the lease to Arms, Wick *alone* entered into a side contract with him, which is known in these proceedings as "the store contract," and the stipulations of which on the assignment of the lease by Arms to the defendants below they agreed with him to perform "so far as *he* was bound to perform them."

This store contract being an important element in this case and having features so unique that I fear no synopsis could do it justice, I set out entire, in order to a full understanding of the case, and because it seems to me to be well deserving of such perpetual remembrance as the process of embalming in a book of law reports can confer. It is as follows:

"This agreement, made this first day of January, A. D. 1856, by and between Charles D. Arms, of the first part, and Hugh B. Wick, of the other part, witnesseth:-

"The said Charles D. Arms, in consideration that the said Hugh B. Wick, together with other persons, did, on the 15th day of June, A. D. 1855, lease and rent or let unto the said C. D. Arms certain rights and privileges of mining and removing stone coal on and from what is known as the 'Baldwin farm,' in Youngstown, Mahoning county and State of Ohio (reference being hereby made to said lease and agreement), and in pursuance of an agreement to this effect, made at the time of making said lease, the said C. D. Arms does covenant and agree with said Hugh B. Wick that he, his heirs, administrators and assigns, will use and exert all his and their influence, in a reasonable and proper manner, to have each and all of his and their employes, laborers and agents and the entire families of all such employed in any way in the mining operations contemplated by said lease on said lands, or connected therewith, under his or their employment, do their entire trading, and make all their purchase of goods, merchandise, clothing, boots, shoes, groceries, etc., at and through the store or stores of said Wick, his heirs, administrators or assigns, is or may be hereafter interested in as owner or owners, in whole or in part, or at such store or

stores, or with such person or persons or with such firm or firms as he, the said Wick, his heirs or assigns may at any time direct (he or they giving said Arms, his heirs or assigns or their representatives, reasonable notice thereof) in the same manner, and to the same full extent as if said Arms, his heirs, administrators or assigns were at the time of such contemplated business, interested in such store as owner or owners, in whole or in part, and to secure to such store the entire trade, patronage and custom of all his and their employes, laborers and agents and their families, during the continuance of the aforesaid lease of June 15th, 1855; and with intent, and for that purpose, the said Arms agrees and binds himself that neither he, his heirs, administrators or assigns will, during the continuance of the aforesaid lease, make any agreement or arrangement with other store, firm or persons, to have any of his or their employes, laborers, agents or any of their families aforesaid, do any of their trading or mercantile business, or make any of their purchases of goods, wares or merchandise at or with any other store, firm or persons than the stores, firm or firms said Wick may be interested in, or such as he may direct as hereintofore contemplated. And the said C. D. Arms, for himself, his heirs, administrators and assigns, agrees that he and they will not pay or cause to be paid or assume to pay any debt, account or claim any other store, firm or person may have against any of his or their aforesaid employes, agents or families for goods, wares or merchandise furnished to said employes during such employment or prior thereto (than such as said Wick or his legal representatives shall direct), nor accept, receive or pay any order or orders drawn by any such employes or agents or their representatives, for goods, wares or merchandise, as above mentioned, purchased by him or them of any other store, firm or persons, nor give any such employes or agents any order or orders to any other store, firm or persons for goods, wares or merchandise, nor any note or other evidence of indebtedness, in order that the same may be disposed of, or transferred, for goods, wares or merchandise, contrary to the spirit of this agreement, nor purchase any note or other evidence of indebtedness giving by any such employes or agents or their families for goods, wares or merchandise, with intent to evade any of the stipulations herein, on his or their part.

"But on the contrary he and they, the said Arms, his heirs and assigns, will justly and fairly comply with the full and true intent and meaning of this agreement by using his or their influence, so far as the same can be reasonably and fairly done, to have each and all of his or their aforesaid employes, laborers, agents, and their families, do all their trading and business and make all their purchases as aforesaid at and through, and confer all their patronage and custom upon the store or stores, person or persons, as said Wick, his heirs or assigns shall direct. And with and for the intent and purpose aforesaid, the said Charles D. Arms, for himself, his heirs, administrators and assigns, agrees and obligates himself and theirselves, that he and they will, during the continuance of the aforesaid lease, assume and pay any and all accounts, claims and demands contracted by any of such employes, laborers, agents or their families, at the store said Wick, his heirs or assigns may be interested, or such person or persons as said Wick, his heirs or assigns, may be interested, or such person or persons as said Wick, his heirs or assigns may direct, to the amount equal to the same earned by such employes, laborers or agents in such employment for said Arms, his heirs, administrators or assigns. But if any such employes, laborers or agents shall dispute the correctness of any such account or claim before mentioned, the same is to be settled and determined by the person or persons to whom the same is due, without charge or loss to said Arms, his heirs, administrators or assigns. And if said Arms, his heirs, administrators or assigns, shall refuse to pay any of his or their employes, laborers or agents by reason of any such dispute as to the correctness of such amount, said Wick agrees that he, or the person having such account or claim will pay all cost, charges and loss occasioned by any litigation arising therefrom, so as to save said Arms, his heirs, administrators or assigns, harmless by reason of any such litigation; and in order to the proper settlement of all such accounts and claims and the payment thereof by said Charles D. Arms, his heirs, administrators and assigns, it is further agreed that said Arms, his heirs, administrators and assigns will render monthly, to such store or person or persons as said Wick, his heirs, administrators or assigns shall direct, a full statement of all the

accounts with any and all his or their employes, laborers, agents and their families. And it is further agreed that for each and every violation by said Arms, his heirs, administrators or assigns, of any of the stipulations herein on his or their part, he or they will pay and are bound to pay said Wick, his heirs, administrators or assigns, a sum not less than five dollars as liquidated damages and cost.

"In witness whereof, we, the contracting parties, have hereunto set our hand and seals, year and date above written.

"In presence of

"LEMUEL J. WICK.

"CHARLES D. ARMS,

"HUGH B. WICK."

Such being the contract relations of the parties, and Crawford & Murray having, as is alleged, become delinquent in the performance of the stipulations of the lease on their part, and having failed to influence the trade and patronage of their employes in accordance with their obligations assumed under the store contract, and Wick threatening to exact and enforce a forfeiture of their term under the lease, and having taken preliminary steps to that end, and claiming damages for their failure to fulfill "the store contract," the parties, in March, 1858, met together and entered into the parol contract on which the original action in this case was brought, and which was, in substance, this:

In consideration that Wick would forbear to enforce the forfeiture of the lease against the plaintiffs in error, and would permit them to continue to occupy and work the demised premises in accordance with the terms of the original lease, and would relinquish his claims for damages on account of their non-performance of the stipulations of the store contract, Crawford & Murray agreed to pay him three cents per ton on all coal already mined, and four cents per ton on all coal thereafter to be mined under said lease, in addition to the payments stipulated for in the lease, and this not only on Wick's share of the coal mined and to be mined, but also on the shares of the other owners of the leased premises in common with him, who were not parties to this parol contract. The non-payment of the three and four cents per ton thus agreed to be paid, and also the non-performance of certain stipulations of

the original lease, are the breaches assigned, and on the ground of which a judgment for damages is prayed.

The defendants below demurred generally to the petition. The demurrer was overruled, and the defendants below answered, denying any delinquency by them in the performance of the covenants of the original lease by which any forfeiture by them was incurred, denying that Wick had taken the proper steps to forfeit the same, denying the making by them of the parol contract alleged in the petition, and their liability to pay the said three and four cents per ton, as claimed by him.

The case was tried to a jury, and Wick had a verdict for \$6,712.42. The defendants below moved for a new trial on the grounds, *inter alia*, that the court had erred in various rulings as to the admissibility of evidence, in its charge as given to the jury, in refusing to charge as requested by defendants below, and that the verdict was not sustained by sufficient evidence.

The motion for a new trial was overruled, and judgment was rendered on the verdict. Thereupon a bill of exceptions was taken, embodying the various rulings of the court upon the trial, its charge as given, its refusal to charge as requested, and all the evidence in the case. The defendants below now make, by their assignments of error, substantially the same points made by them on their motion for a new trial below.

On the argument of the case in this court counsel have made and elaborately argued numerous questions which we do not find it necessary to consider, or even to notice.

We are of opinion that on the case made by the pleadings and evidence the plaintiff below was not entitled to recover; and that the court of common pleas erred in overruling the motion for a new trial; and this for two reasons:

1. The contract on which the action was brought, not being in writing, was clearly within the Statute of Frauds. It was a contract for an interest in lands and tenements; for a right to use, occupy, and enjoy lands and tenements; to mine coal within and upon them, and to pay rent for them; and there was no such performance of the contract as to take it out of the operation of the statute. The evidence shows that Wick, on his part, did simply nothing. He ceased to threaten

to exact a forfeiture of the original lease, and took no further steps to enforce such forfeiture; while Crawford & Murray, on their part, continued to pay, and Wick to receive, the rents stipulated for in the original lease *and no more*, all the time up to the final surrender of the term by Crawford & Murray and the acceptance of the surrender by Wick. Crawford & Murray did not yield up possession of the demised premises at or about the time of the making of the alleged parol contract, but for years afterward, continued to occupy them right on without visible change; the possession of the demised premises was continuous and unbroken, and is referable as well to the old, as to the new or supplemental lease. The case of *Armstrong v. Kattenhorn*, 11 Ohio, 265, is very closely analogous to the present case, so far as this question is concerned, and is conclusive of it. It is there decided, that "a tenant in possession, in case of a parol agreement for different terms of holding, if no acts are performed which clearly show that the possession is continued under the last agreement, it will be referred to the original tenancy, and such parol contract will be void."

2. Because the court below erred in recognizing, as it did, both in its charge to the jury as given, and in refusing to charge as asked, the relinquishment by Wick of a claim of damages for the non-performance of the stipulations of the store contract, as being a valid consideration for the contract sued on. The contract sued on rested, as is alleged in the petition, on two items of consideration, to wit: forbearance to exact a forfeiture of the old lease, and the claim for damages under the store contract. But if the store contract was fatally tainted with illegality and wholly void, then no valid claim of damages for its breach could exist to constitute a consideration for a new contract.

This much being premised, let us look into this store contract, and at the principles of law bearing upon it. It is an elementary doctrine, that contracts in general restraint of trade are unlawful, and therefore void; though as a general rule, agreements which stipulate only for a partial or particular restraint, are recognized as valid: *Metcalf on Contracts*, 232. To this latter general rule, however, there is an important exception which must not be overlooked; and which is

thus stated in a book of high and venerable authority. "Whatsoever a man may lawfully forbear, *that* he may oblige himself against; *except where a third person is wronged*, or the *public* is prejudiced by it." C. J. Wilmot's Opinions (*Low v. Peers*), 377.

And the learned chief justice adds, in treating of this subject, on the next page, "it is the duty of all courts of justice to keep their eye steadily upon the interest of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public, *and which has a bad tendency*, to give it no countenance or assistance '*in foro civili.*'" Now in the light of these principles, retaining our common sense in its integrity, and not allowing our vision to be obscured by so flimsy a veil as that which is attempted to be cast over the provisions of this contract by the use of the fair seeming phrases, "in a reasonable and proper manner"—"so far as the same can be reasonably and fairly done"—and the like, let us look into some of the particular provisions of this store contract; into its general scope and tendency, and into the character and aims of the scheme which it embodies, organizes and discloses.

Selecting now a single gem from the casket of precious things, we hold it up to the light. Here it is. The lessees agree that they will not "accept, receive or pay any order or orders drawn by any of 'their' employes or agents or their representatives, for goods, wares or merchandise * * * purchased by him or them of any other store, firm or persons, nor *give* any such employes or agents any order or orders to any other store, firm or persons for goods, wares or merchandise, or any note or other evidence of indebtedness in order that the same may be disposed of or transferred for goods, wares or merchandise, contrary to the spirit of this agreement," etc. Now, throwing over these stipulations a mantle of charity broad enough to cover a multitude of sins, and with a web thick and dense enough to conceal from our sight their otherwise obvious intentions, what is their *tendency*, and what would be their probable practical operation? A lessee of a coal mine who submits to a contract, the terms of which are so repulsive and degrading to himself, may well be supposed to be far from independent on the score of pecuniary means;

and the last stipulation in the above extract from the contract presupposes that he will become indebted to his workmen, and hence be obliged to give them "notes or other evidences of indebtedness," to be by them transferred for personal and family necessities. Suppose such a case to occur. The lessee becomes indebted to his workmen. Perhaps the mine has not yet become productive, or the means of transportation are not obtainable, or the market for coal happens to be glutted. The workmen want provisions and clothing for themselves and families, and the notes of their employer to be negotiated in exchange for these necessities; and these they can have, but in such a way only as to hedge them out from the benefit of competition among shopkeepers. They must take their notes to the store of Wick, and trust to his sensitive conscience and regard for fair and just dealing, first, as to the amount of discount they must allow him on their notes transferred to him, and second, as to the prices he will exact for the goods they receive in exchange. Again, the terms of the contract presupposes, and assuredly it is no violent presumption, that circumstances may exist which will render it necessary for the workman to anticipate his wages. Suppose such a case. Sorely needed wages are not yet earned. Perhaps he is ill, and has to await the return of health to earn them. At all events, pay-day is yet in the future. He goes or sends around among the retail shops, and being known as one of Crawford & Murray's coal diggers, he finds that, from some inexplicable reason, prices of needed articles are high at Wick's, while at other shops they are comparatively low. The simple soul prefers to deal with some one of the latter. He goes to its proprietor, states his situation and necessities, and proposes the purchase of certain necessities, and for the price of them to give an order on his employer, to be paid out of his wages when they accrue. The shopkeeper answers: "Yes, you can have what you need at the regular prices named, provided your employer will accept your order. Call again to-morrow, and in the meantime I will see him, and so be able to give you an answer." Accordingly on the next day, he calls again, and is told that his employer says that he is under a contract to accept no order from a workman unless it be given on Mr. Wick. And so he too is turned over to the alternative of

either doing without the things which he needs, or of subjecting himself to the tender mercies of "the party of the other part," to the store contract.

Having thus, in the most moderate colors which my estimate of the character and tendency of this store contract permits, endeavored to depict one of its characteristic features, I place it side by side with the time-honored principles announced by Chief Justice Wilmot, and submit it to the ordeal of those principles: "Whatsoever a man may lawfully forbear, that he may oblige himself against, *except where a third person is wronged*, or the public is prejudiced by it." "It is the duty of all courts of justice to keep their eyes steadily upon the interest of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public, *and which has a bad tendency*, to give it no countenance or assistance in '*foro civili*.'" "

A majority of the court are of opinion that the particular segment of the store contract above commented on, being in restraint of trade, and naturally tending in its practical operation to inflict wrong, disadvantage and suffering upon third persons, is unlawful, and being in its character inseparable from the other provisions of the contract, it taints the whole: Metcalf, 216, 247; 11 Wheaton, 258.

I have invited special attention to that portion of the store contract above remarked upon, not because I regard the legal or moral character or the practical tendency of that portion of the contract as being exceptional when compared with its other provisions or with the contract as a whole, but rather by way of illustration of the character and tendency of the whole scheme which the contract embodies, organizes and discloses. It is but one of a litter, in which the family resemblance, apparent in the aspect of all, sufficiently establishes a common parentage, and precludes the hypothesis of a case of superfetation by a plurality of sires.

It is said in Bacon's Abridgment, Vol. 2, p. 299, that "as to bonds entered into in restraint of trade, it seems to have been always admitted, and hath been frequently adjudged, that a bond restraining trade in general, as that a person shall not follow such a trade in any part of the kingdom, is void; the reasons whereof are that such bond tends to a

monopoly, and is against the public good; deprives the party of his means of livelihood; enables masters to lay hardships upon their servants" and "apprentices; tends to oppressions," etc. And so on the next page it is added "if the condition of a bond is that the obligor shall not buy any sheeps-trotters of any person of whom the obligee had bought or should buy, this is void, being a restraint of trade, and tending to a monopoly."

The majority of the court are of opinion that viewing this store contract as a whole, and the scheme which it embodies, it comes clearly within the reasons thus stated on the ground of which it is the policy of the law to avoid certain contracts, and to overthrow every superstructure which is reared upon them as a foundation. It tends to restrain trade in a manner operating naturally and almost inevitably to the injury of others; it tends to unwarrantable monopoly, to extortion, and to the depriving of the hireling of the full benefit of his wages when earned and of the benefit of such legitimate credit as he might have on the basis of wages to be earned.

I have not been able to find any direct precedent for holding that a contract whereby the influence of an employer over his employes is sold to, and for the benefit of a third person, is void; nor have I been able to find any to the contrary. But knowing, as we do, that the relation of employer and employe is, to a great extent, one of mutual dependence, but a dependence generally preponderating in favor of the employer and against the employe, and when it is easy to see that in the fast coming future, as manufacturing and mining operations are enlarged and multiplied, as population becomes more dense, and the labor market becomes more and more choked by the increasing number of competing hands for its employ, the dependence of the laborer on his employer will become greater and more influential, I can not but think, and, speaking for myself alone, I must say, that such ought to be the law; and it seems to me that such a case would come clearly enough within the scope of principles already established, to warrant a court, governed by a just and forecasting judicial policy, in declaring that a contract for the sale of an employer's influence over his employes, in respect to matters

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of trade, is, in itself alone, so liable to abuse, so dangerous in its tendency, and so likely to tempt hard, grasping and greedy men to the easy practice of extortion and oppression upon a dependent class, as in the language of Chief Justice Wilmot, to forbid its receiving either "countenance or assistance *in foro civili.*"

The store contract, then, being wholly unlawful and void, the giving up of a claim of damages for a breach of its stipulations furnished no consideration for any new contract. And in so far as such relinquishment of claim entered into, and constituted the basis of the contract sued on, so far, to say the least of it, the latter was without consideration; and the court below erred in refusing so to charge the jury, and in its distinct recognition of the validity of the store contract in its charge as given.

Judgment reversed, new trial awarded, and cause remanded to the common pleas.

DAY, C. J., and WELCH and WHITE, JJ., concurred.

SCOTT, J. I concur in the judgment of reversal, in this case, solely on the ground indicated in the first proposition of the syllabus.

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(Law Reports, 9 Equity, 538. Before the Vice Chancellor, 1869.)

¹**Minimum rent—²Instroke—Specific performance of working covenants refused.** The plaintiffs let a coal mine to the defendant, receiving a minimum rent of £720, to be increased to £1,000 in case pits were sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessee covenanted to work the mine uninterruptedly, efficiently and regularly, according to the usual or most improved practice. The lessee paid the minimum rent, but only raised a small quantity of coal by working through an adjoining property, without sinking pits upon the estate. Plaintiffs desiring a larger amount of working, whereby an increased royalty would accrue, filed a bill for specific performance of the covenants in the lease: *Held*, that there was no obligation upon the defendant to sink pits, although that might be the

¹ *Gilmore v. Ontario Co.*, 86 N. Y. 455; *Scioto Co. v. Pond*, 38 Oh. St. 65.

² *Whalley v. Ramage*, 8 M. R. 52; *Tiley v. Moyers*, 25 Pa. St. 397; *Post WORKINGS.*

most efficient mode of working; and that so long as the minimum rent was paid the defendants could not be compelled to work the mine at all; that the lessee had committed no breach of contract, but if they had, the remedy was at law and not in equity; and that the court could not, by a reference to chambers, give effect to the covenant by direction as to the management of a coal mine. Bill dismissed with costs.

Relation of covenant for sleeping rent to the covenant to work the mine considered, upon the view that so long as this rent is paid the covenant to work is inoperative, such rent being the alternative to a covenant for royalty and a payment to the lessor while he keeps his coal.

This was a bill filed by Thomas Randall Wheatley and Moreton John Wheatley against the Westminster Brymbo Coal and Coke Company, limited, for a declaration that the defendant company was bound to work the Gwersylt Coal and Ironstone Mine, of which the plaintiffs were the owners, uninterruptedly, efficiently, regularly and according to the usual and most approved practice adopted in working mines of coal and ironstone, according to the provisions of the lease under which the company held the mines, and also that the company was bound to work the "Two-yard," "Brassey" and "Main" seams in such a manner as not to get one and leave the others ungotten.

On the 12th of February, 1859, the plaintiffs, being seized in fee of the Gwersylt estate, in Denbighshire, entered into an agreement with the company to grant them the lease in question. By this contract the lessees were to have two years for proving the coal, paying for all that should be gotten during that time, and at the expiration of the two years the lease, dated the 7th of July, 1862, was made between the plaintiffs of the one part and the defendants of the other part, by which the plaintiffs granted, demised and leased unto the defendants, their successors and assigns, the mines, seams, veins and beds of coal, and balls and bands of ironstone, under the Gwersylt estate, containing 465 acres, with full power and license to the lessees to enter upon the estate, and to erect or remove buildings and machinery necessary for setting the coal and iron works afoot, and to bore and search for coal, and to drive, sink and use any pit, shaft or tunnels, or, if necessary, subterraneous work, and to do all other acts, matters and things within, through, over or on the estate for working the mines

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and manufacturing ironstone, pig or wrought iron, and selling and disposing of the same; and also generally into and out of the said Gwersylt estate, to work and drive by outstroke, in-stroke and substroke, getting and carrying away the produce of the Gwersylt mines, as well as any other mines, and to connect the works with the Brymbo Mineral Branch of the Great Western Railway. The lease was for twenty-one years from the twenty-ninth of September, 1866, renewable for a further term of twenty-one years, and determinable as after mentioned, the lessees paying as follows:

For the first year the fixed minimum rent of £500; for the second year, £600; for the third year, £700; and for the fourth, and every following year, £720; and so in proportion for less than a year. But in case at any time during the term the lessees or their successors should sink a pit or shaft, then from and after the expiration of two years they should pay a minimum fixed rent of £1,000, all the minimum rents so fixed to be paid half-yearly. There were also provisions for payment of a royalty of £30 per acre for workable and salable coal of one foot thick of the several seams called "Two-yard," "Brassey," and "Main" coal, and £20 per acre for coal of inferior quality, and £20 per acre for all other seams, with the usual clause that if in any one year they should not work up to the fixed rents, the deficiency might be made up in subsequent years, and there provisions for royalties on the ironstone. The lease also contained a covenant on the part of the lessees that they would at all times during the continuance of the terms thereby granted, work and carry on the said mines of coal and ironstone thereby demised, uninterruptly, efficiently and regularly except in the event of strikes of workmen or other casualties, according to the usual or most approved practice adopted and used in the working of mines of coal and ironstone; and should and would get and raise the said seams or beds of coal thereby demised clearly out in regular course, and should work the upper of the said seam or beds, respectively called the "Brassey," the "Two-yard," and the "Main" coal, each seam in advance of the seam next before it respectively, so as not to endanger the other seams by undermining. Power was reserved to the lessees to give up possession at the end of five years, or at

any time afterward, on twelve calendar months' notice, with a clause giving power to refer all differences to arbitration. The bill alleged that the three seams of coal contained altogether about 9,000,000 tons; that the defendant company were lessees of the Brymbo mines adjoining the mines now leased and held under the Marquis of Westminster, and they had sunk pits on the adjoining estate, and by means of an inclined plane or downbrow driven into the "Brassey" seam, they had worked that seam without the others, but only to a small extent.

The case came on in January, 1865, upon motions for an injunction, and to stay proceedings in the suit, before Vice-Chancellor Kindersley (2 Dr. & Sm. 347), who refused both motions.

The cause now came on for hearing. The bill charged that the defendants had not worked the mines according to the lease, the working having been altogether illusory, and from 1862 to 1868 only an acre and three quarters of the "Two-yard" and eighteen acres of the "Brassey" having been worked, the "Main" not having been worked at all, and the quantity not exceeding 110,000 tons, and not one ninth of the quantity worked out of the Brymbo mines; and if the defendants continued to work as they had done, not more than one twelfth of the coal would be gotten within the term of the lease; that the beds of ironstone were very valuable, and that they had not virtually been worked at all; that if the defendants had worked the coal and ironstone according to the lease, royalties would have been payable to a very large amount, and owing to the defendants' neglect and default the plaintiffs had suffered a great pecuniary loss. The bill also charged that the defendants were bound to work all the seams regularly, whereas they did not commence working at all until five years after the date of the lease and nine months after the filing of the original bill.

The defendants, by their masters, and in precisely the same manner as they were working the Brymbo mine, but that they were at liberty to work one seam and leave the others, as they thought convenient. That they had hitherto been unable, from the depressed state of the coal trade, to find a market for a larger quantity of coal than they had worked from the

plaintiffs' mines; that they were not bound by the lease to carry on the works by means of pits, but that, according to the terms of the lease, it was at their option to do so or not, as they thought proper, and inasmuch as they had regularly paid the dead rent, that was all that could be required of them.

A considerable of evidence was gone into on both sides, chiefly having reference to the question of sinking pits. The defendants had only worked the coal under the Gwersylt estate by means of downbrows from the adjoining mines, and had never sunk pits upon the Gwersylt estate. The principal witnesses on behalf of the plaintiffs, namely, Messrs. Shone, Cadwaladr and Livesey, expressed their opinion that it was impossible to work the mines efficiently without sinking pits on the Gwersylt estate. This, however, was denied by the evidence adduced on behalf of the defendants.

Mr. GLASSE, Q. C., and Mr. NALDER, for the plaintiffs.

The defendants are bound by their lease to work this mine uninterruptedly and regularly, according to the approved practice. The meaning of these words must be that they are to work without intermission, and to do so in such efficient manner as to obtain such an amount of coal as could by the most approved method of working. They have, on the contrary, broken their covenant in every respect. It was not till some time after the lease was granted that they commenced working the coal; they have only continued the works at intervals, therefore they have not worked uninterruptedly. There is evidence to show that the only efficient means of working the mine is by sinking pits upon the land. This they have not done; but all they have done is to work one only of the seams by means of an inclined plane or down-brow through their mines in the adjoining land, belonging to the Marquis of Westminster. The defendants have not in any year worked coal sufficient to amount to the minimum or dead rent which they are bound to pay; the consequence of this is, that the plaintiffs are not receiving the full amount of increased rent in the way of royalties which they are entitled to and would receive if the mines were effectually and prop-

erly worked. As it is, they receive only £720 a year, while they ought to be in receipt of at least £2,000 a year. The real cause for this course being pursued by the defendants is, that they are working the adjoining mines to the fullest extent that they are capable of, and it is more for their advantage to sell that coal and keep the coal from the plaintiffs' mine out of the market. They consequently prefer paying the dead rent in order to prevent any other person from working the coal. The evidence goes to prove that the only efficient mode of working is by pits sunk in the land, but the plaintiffs are not particular as to the mode of working so long as the coal is efficiently worked; and the best mode by which this may be done can be ascertained in chambers. All we ask is, that the defendants shall be ordered to work in pursuance of the terms of their covenant. The words must mean something, and if there is any doubt about the mode of working, directions can be given in chambers.

It was held in *Tipping v. Eckersley*, 2 K. & J. 264, that where the construction of a contract is clear, and the breach clear, it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere: *Anon.*, Amb. 209; *Clavering v. Clavering*, 2 P. Wms. 388; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515. There is no suggestion here that the damage is not substantial, and it is quite clear that the amount of damage may be clearly ascertained: *Lloyd v. London, C. & D. Ry Co.*, 2 D. J. & S. 568; and in cases of contract like the present, specific relief will be granted without reference to the amount of injury: *Dickenson v. Grand Junction Canal Company*, 15 Beav. 260. That an effectual decree can be made for deciding as to the mode of working the coal is shown by *Hood v. North Eastern Railway*, Law Rep. 8 Eq. 666, where a covenant was entered into by the railway company that a certain piece of land should be used as a first class railway station. The court decreed specific performance of the covenant, with a direction that the rooms and officers necessary to constitute a first class station should be ascertained in chambers.

A similar reference to ascertain the mode of carrying out certain works was directed in *Lytton v. Great Northern Railway*, 2 K. & J. 394, and in *Sanderson v. Cockermouth*

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and *Workington Railway*, 19 L. J. Ch. 503, and *Wilson v. Furness Railway*, before Vice Chancellor James, on the 3d of November, 1869.

The vice chancellor expressed his opinion that there was no obligation upon the defendants to work the plaintiffs' mine by sinking pits, and on that part of the case he did not require counsel to address the court.

Mr. COTTON, Q. C., and Mr. FREELING, for the defendants.

If it is to be ascertained by a reference to chambers how the mine is to be efficiently worked, it will compel the court not only to take on itself the constant inspection of the mine, and constant directions as to the mode of working, but it will materially interfere with the proper working. We should be obliged to go to chambers from time to time to ascertain whether our system of working is consistent with what the court may deem an efficient working, and this would interfere with the discretion of those who have the superintendence of the mine. There is, in fact, no complaint of our mode of working, it is simply a money demand—a means of compelling us to pay a higher rent. No injury whatever is alleged, and the court, therefore, will not interfere, but will leave the plaintiffs to their remedy at law. If the sleeping rent is not the rent that should be paid, there is no means of ascertaining what the rent must be. The real question is, whether we are bound to work more coal than we are working. The fact is, that the lessees have not worked up to their dead rent, but that they have spent a large sum in opening up the mine is sufficient answer to any allegation of *mala fides*. If there had been any fraud connected with the working, then the court might have interfered; but there is no allegation of improper working. The only complaint is an insufficient working. Upon this point we maintain not only that we can not be compelled to work more than we have done, but that we may, if we choose, discontinue altogether the working, and that we may work as little as we please so long as we pay the dead rent. There is no authority for saying we can be compelled to work, though if we do work we are bound to work in a skillful and proper manner: *Quarrington v. Arthur*, 10 M. & W. 335.

The counsel were here stopped by the court.

Mr. GLASSE, in reply, cited *James v. Cochrane*, 8 Ex. 556; *Green v. Sparrow*, 3 Swanst. 408; *Ridgway v. Sneyd*, Kay 627; and *Rogers on Mines*, 574.

SIR R. MALINS, V. C.

This case has been very elaborately and carefully argued, and it will not, therefore, be for want of the most complete assistance on the part of counsel that I shall err, if I do err, in the judgment I am about to give.

The case raises points of great importance, not only to the parties concerned, but also to that large portion of the community engaged in mining operations. The rights of the parties must depend, however, on the legal contract existing between them, which is constituted by the lease of the 1st of July, 1862, and which is fully set out in the bill.

But before I go to the terms of that lease, it is not unimportant to look at the position of the parties, and to see what were the circumstances which led to the execution of that lease.

The plaintiff, Mr. Thomas Randall Wheatley, and his son, Mr. Moreton John Wheatley, who is a captain in the Royal Engineers, have been for some years past the owners of the property in question, and at the time of the contract they were seized in fee of the land on which the mines in question are situated. The Gwersylt is an estate of 465 acres in extent. It has immediately adjoining to it an estate called the Brymbo estate, which was in the year 1859, and had been for some years before that time, worked by the defendants, who had then been and are now working the adjoining mine on a large scale. The coal measures lying under this property have an inclination, as appears from the evidence, of about 1 in 7, the plaintiffs' estate being immediately adjoining the estate which is held by the defendants, under a lease from the Marquis of Westminster. The dip of the measures is from the defendants' estate down to the plaintiffs' estate, so that, of course, in working the plaintiffs' estate they must work at a greater depth than they do in working the Marquis of Westminster's estate. It appears that no attempt had been made prior to 1854, to grant

any lease, nor to have the coal under this estate worked, and that doubts were entertained whether, if coal were found, it would be found in a workable condition, and a profitable property to work. That may have been the cause why no steps were taken either by Wheatley or his son to procure the working of these mines. However, as the case now stands, the evidence is quite clear that the quantity of coal under the Messrs. Wheatley's estate is not less than 9,000,000 tons, and that it is capable of being worked to the extent of 500 or 600 tons a day, which, at the royalty that is paid under this lease, amounting to 6*l.* a ton, would produce a very large income to the Messrs. Wheatley. The agreement which was executed by the parties on the 20th of February, 1859, is conclusive evidence as to doubts of the practicability of working the mines, since it was provided that the defendants should be allowed two years to prove the existence of coal, paying only for the quantity got. The other terms of the agreement were carried into effect by the lease itself, which was executed two years and a half after the contract. The works were opened sufficiently for the purpose of proving the coal, and the defendants having satisfied themselves that the coal was there, and that it was in a workable condition, the rights of the parties were finally determined by the lease of the 1st of July, 1862. (His Honor then stated the provisions of the lease already fully set out.)

Now, it has been contended that there is an obligation in this lease to sink pits, and there is no doubt that common sense would point out that if there be a demise of a coal mine unopened, and there is not an adjoining one open, the only way in which you can by any possibility get to the coal is by sinking pits; but I confess I can have no hesitation in coming to the conclusion that the object of these lessors in 1859 or 1862 (although their views may have changed) was not to encourage the sinking of a pit, but rather to discourage it, and therefore they give the power to the defendants of working these mines by instroke and substroke, and then provide that if (not therefore contemplating that it would be a matter of course that pits should be sunk), but that if pits should be sunk, then, that instead of encouraging the sinking of those pits by diminishing the sleeping rent on account of a great

expense being incurred in sinking them, they increase the sleeping rent from £720 a year to £1,000 a year. The portion of the covenants which has been mainly relied upon, and which has been, in fact, the subject of this suit, is in these terms: "and also that the lessees shall and will work and carry on the said mines of coal and ironstone hereby demised, uninterruptedly, efficiently and regularly (except in the event of strikes of workmen, accidents or other casualties), according to the usual or most approved practice adopted and used in the working of mines of coal and ironstone, and shall and will get and raise the same seams and beds of coal hereby demised, clearly out in regular course, and shall work the upper of the said seams or beds, respectively called 'the Brassey,' 'the Two-yard,' and 'the Main coal,' each seam in advance of the seam next before it, respectively, so as not to endanger the upper seams or seam by undermining." Then there is a clause containing a power to the lessees at any times at the end of seven years, or at the end of any one year, by twelve months notice after that time to determine the lease. From the time of the execution of this lease in July, 1862, it is admitted the defendants have regularly paid to the plaintiffs the sleeping rent of £720 per annum, but considering that in 1862 the existence and workability of the coal under the Gwersylt estate has been proved, and that the lease had been executed in the expectation on the part of the plaintiffs, as in the belief also on the part of the defendants, that large mining operations would be carried on under this estate, it is not to be wondered at that the Messrs. Wheatley became greatly disappointed at the result which took place, namely, that they did not get more than the sleeping rent of £720 a year. I think it will be found in order to work up to the sleeping rent, it would require something like eighty or ninety tons to be worked out every day. The evidence is clear that there would be no difficulty whatever in working the colliery to the extent of some 200 or 300 tons a day, and, of course, if they work 300 tons a day it would give the lessees, in the shape of royalty, 300 sixpences, or £7 10s., and that would make a large increase in their receipts.

Finding, therefore, that in the year 1865 they got nothing but their sleeping rent, and that the sleeping rent had not

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been worked up to, it being also admitted on both sides that up to the present time the workings have not amounted to the sleeping rent by some £2,000, so that now the lessees will be at liberty to work so many tons at 6*d.* a ton as will produce £2,000 without paying anything additional, I repeat that it is not to be wondered that the Messrs. Wheatley were disappointed at the result of the operations in 1865. At the same time they should have remembered that £720 is a very large addition to the income on an estate of 465 acres the slightest damage done to it, and without any portion of the surface being touched, nothing being done upon their estate which any one walking over it could by possibility have discovered. Therefore, although it was open to both parties to entertain these different views of their dealings with one another, the question is, whether anything has taken place which justifies the institution of this suit. The original bill was filed on the 5th of January, 1865. The dissatisfaction of Messrs. Wheatley at that time, and their dissatisfaction now, is not, I am certain, as to the mode of working the mine by the defendants, but as to the extent of the working only. If the extent of the working would have been sufficient, I am perfectly satisfied that this bill would never have been filed; what they want is to receive more money in the shape of royalty. It is perfectly clear, for the reasons which I have already stated, that neither in 1859 nor 1862, did the parties contemplate that pits would be sunk, nor did the Messrs. Wheatley desire that they should be sunk. On the contrary, I think it is obvious they desired they should not be sunk. The question was distinctly raised by the original bill. The present bill does not in terms pray that they should be ordered to sink pits, or require that they should do so. But the evidence in the cause, as now given, is directed expressly to this point. If the evidence of Mr. Shone, the plaintiff's mineral agent, gives a correct view, the lease of 1862 might have thrown the obligation of sinking pits upon the defendants; whereas, as I have already observed, instead of throwing that obligation upon them it relieves them from it, and rather goes to prohibit than to favor it. But Mr. Shone says that ever since he became concerned for the plaintiffs he has been strongly of opinion that it was and is necessary to sink pits upon the Gwersylt estate,

in order effectually to work the mines thereunder, and he says he continuously urged this, without success, till the month of September last, when the defendants gave him a notice requiring to take a piece of land for the purpose of sinking a pit or pits thereon. Mr. Cadwaladr, who, no doubt, is a gentleman of great experience, follows the same idea (I do not see the slightest reason to dissent from his evidence, on the contrary, as far as I can form any opinion upon the subject, I think that the evidence of Mr. Shone and Mr. Cadwaladr is well founded). Mr. Cadwaladr says, and there is no doubt about it, that these collieries never can be worked to the fullest advantage unless pits are sunk upon the estate. But it does not, therefore, follow from that, that the plaintiffs are entitled to have them so worked.

Then the next witness, Mr. Livesey, a gentleman of great experience, entirely confirms the views of Mr. Shone and Mr. Cadwaladr. In fact all the principal evidence for the plaintiffs is directed to the necessity and the obligation of sinking pits.

It is stated that from the 1st of January, 1862, down to the present time, the defendants have worked only about one acre and three quarters of an acre of the "Two-yard" seam, and only about eighteen acres of the "Brassey" seam, and they have not worked the "Main" seam at all, and the quantity of coal worked by them up to the present time does not exceed 110,000 tons, and not more than one ninth part of the total quantity of coals worked by the defendants out of the mines of the Marquis of Westminster and others; and if the defendants are permitted to continue working in the same manner, not more than one twelfth of the coal in the mines will be gotten within the term of the lease, that is, within forty-two years.

Then it is further alleged by the plaintiff that the defendants' assertion that they are unable to find a market for the coal is without foundation, since they are now selling eight times as much coal raised from the Marquis of Westminster's mines as they have raised from the plaintiffs'; but that if it were a fact that they could not sell the coal, the defendants might, so as to prevent their working at a loss, determine their lease by giving the plaintiffs twelve months' notice. The plaintiffs charge, however, that so long as the defendants

remain lessees, they are bound to work according to the terms of the lease.

It was urged by the plaintiffs' counsel that the covenant to work efficiently and regularly necessarily implied that pits should be sunk, and that the only mode of efficiently and regularly working the mines was by sinking a pit. I have already said that in that view of the case I entirely concur; but that does not settle the question before me, which is, what are the rights of the parties under this lease of the 1st of July, 1862? And although the plaintiffs and their agents now know much more about this mineral property than they did then, it does not follow, because subsequent experience shows that it would be more desirable that pits should be sunk, and that the collieries should be worked upon a larger scale, that the plaintiffs have the right to require them to be so worked.

That brings me to the question, what is the meaning of this contract? I have already shown that this lease does not throw upon the defendants, the lessees, the obligation of sinking pits but it does throw upon them the obligation to work and carry on the mines uninterruptedly, efficiently, and regularly. It has been contended that they do not work "uninterruptedly, efficiently, and regularly," and that that is proved by the small quantity of coal which is raised. No doubt, if the sleeping rent had been fixed at a sufficient amount, for instance, instead of being £720, it had been fixed at £3,000, the interest of the lessors would have been that no working should take place, because if they got payment without the working taking place they would have had their royalty and preserved their coal at the same time. It therefore resolves itself into this question: what is the amount of working which this lease throws an obligation on the lessees to perform? It has been argued that they do not work continuously, and that they do not work effectually, because they do not work a sufficient quantity. Upon that subject I take this view, though I do not intend to conclude the parties by anything that I say. The only question before me is whether a case is made out for the interference of this court; because, if the parties are of opinion that there is an insufficient or ineffectual working, I apprehend that the remedy is not in this court, but in a court of

law. But as I must, for the purpose of determining the question raised before me, put my interpretation upon this covenant, I have invited the learned counsel for the plaintiffs to tell me of any instance in which this court has ever decided that the lessee of a mine is bound to work beyond the amount of his sleeping rent. No such case has been cited, and *Green v. Sparrow*, 3 Sw. 408, n., does not go to the point in the slightest degree. That was a case of this nature: The agreement was, that a rent should be paid in respect of the colliery from the first quarter-day after 1,000 sacks of coal should have been dug. There was no rent to be paid until a certain thing was done; and the point of the case was, that the lessee, who had nearly raised 1,000 sacks of coal before a particular quarter-day, refrained from completing the quantity expressly for the fraudulent purpose of depriving the lessor of this rent. The Lord Chancellor there decided that the refraining to complete the 1,000 sacks of coal was a fraudulent act on the part of the lessees, and he therefore ordered that the rent should commence as if the 1,000 sacks of coal had been dug and raised before the particular quarter-day. But that case does not in the slightest degree tend to show that when the sleeping rent of £1,000 or £720 had been paid there is any obligation on the part of the lessees to go beyond that amount. The difficulty upon this part of the case arises thus: I have asked the learned counsel for the plaintiffs if ninety tons a day, which is the quantity I have taken as being the amount which will cover the sleeping rent, is not a compliance with the covenant to work uninterruptedly, efficiently, and regularly, what is enough?

If the case had been a covenant that they would work a mine to the extent of, say, 200 tons a day, that would be a covenant to pay 200 sixpences, or £5 a day, and that would be a sum, in effect, covering the sleeping rent. If, therefore, the object was to secure a large revenue from this mine by this working, it is most unfortunate that the plaintiffs should not have been differently advised, and that they should not have had a lease in a different form. However, I can only determine the rights of the parties as they arise out of the contract they have entered into, and there is no contract or provision on which can I interfere; there is nothing to enable me to say how much coal shall be worked, whether it should be 100 tons, 300

tons, or, as Mr. Cadwaladr says, 500 tons a day, or 150,000 tons a year. Suppose I were to accede to the proposition of Mr. Glasse, and refer it to chambers to inquire what would be an uninterrupted, efficient and regular working of the colliery; the consequence would be that I should have as many opinions upon this subject as mining agents could be found to give evidence. Every man would differ as to the proper quantity. It is impossible, therefore, that the court could have the means of carrying such a contract into execution. I am unable to see that there has been any breach of the contract; but if the plaintiffs think there has been a breach, I am clearly of opinion that this is not the tribunal to determine that question. What would be the result if I acceded to the prayer of the bill, and I were to direct a reference to chambers to inquire what ought to be done, and how it ought to be done? Should I not be directing the management of this colliery? Would not the affairs of this colliery be conducted under the direction of this court, and would not this court, undertaking to work the colliery, have to give every direction as to how all things were to be done in connection with it, how the wages were to be paid, and, in short, what should be done in every respect?

Mr. Glasse cited many authorities, in the principle of every one of which I entirely agree, as to the doctrine of this court, where it will or will not interfere by way of injunction. In this particular case, for instance, there is a contract that the defendants will not sink a pit except in particular parts of the estate.

If they had proceeded in contravention of that contract to sink a pit in another portion of the estate, it is perfectly clear that this court would have restrained them by injunction from so doing. If the lessor had covenanted that he would not do a certain thing, and had proceeded to do it, this court would prevent him doing it. If it is a thing to be under the direction of the court and he refuses to do that certain thing, the court would oblige him to do it; but I take it that nothing is more clear than this: that this court will not undertake either the construction of a railway, the management of a brewery, or the management of a colliery, or anything of the kind. It will appoint a receiver or manager in certain cases, but for

this court to undertake the working of a colliery—for this court to superintend workings of this description—is entirely out of the question, and it would in my opinion be a violation of all the principles of the court if I were to make a declaration in this case that they have not uninterruptedly, efficiently and regularly worked this colliery, or if I were to refer it to chambers, as I am asked to do, to report what is an uninterrupted, efficient and regular working of the colliery. As to the difficulty of this court interfering in the working of this colliery or matters of that description, what is stated by Lord Hardwicke in the anonymous case in *Ambler*, page 209, and cited by Lord Eldon in the *Birmingham Canal Company v. Lloyd*, 18 Ves. 515, is applicable. It was the rule of the court then and it is the rule of the court now. That was on motion for an injunction to stay lessees from working a coal pit irregularly and detrimentally to the plaintiffs, the lessors. Lord Hardwicke said: “The court grants injunctions to stay working of a colliery with great reluctance from the great inconvenience it occasions. and never will do it but where there is a breach of an express covenant or an uncontroverted mischief. The present case did not come within either of those reasons, and therefore the injunction is refused.”

Now it is a fact that the defendants are not working up to the sleeping rent, and it is perfectly clear that it is not the interest of the plaintiffs to oblige them to work up to the sleeping rent, if they can not oblige them to work beyond it, because the less coal they work the more there will be left in the mine; and provided the plaintiffs are paid their sleeping rent that is all they can possibly require. But the question has been distinctly raised before me, whether in this case which obliges the lessees to pay a sleeping rent and to work the colliery “efficiently”—because that is the meaning of it—is there any obligation on the part of the lessees to work at all, or if they do work at all, to work beyond the amount of the sleeping rent? As no authorities have been cited, I suppose that none exist; certainly I have heard of none myself; and as the point is brought before me I think I am bound to state my opinion that in all cases of mining leases, if the lessors desire to secure the working of their mines beyond the amount of the sleeping rent, they must in the lease insert covenants which throw that obligation on the lessee.

My own opinion is, that provided the sleeping rent is paid, and there is nothing more than a covenant to work efficiently, that covenant means that if they do work they shall work efficiently and regularly; in other words, they shall work in a miner-like manner; but that it is in the power of the lessee to keep the mines unworked as long as it suits his convenience, and that there is no obligation on him to work if he does not choose, so long as he pays his sleeping rent. Therefore I come to the conclusion, in the absence of express stipulation in this case that they shall work, that there is no obligation on them to do anything more than to pay the sleeping rent.

I come therefore to the conclusion, first, that there is no obligation on the part of the company to sink any pits; that the plaintiffs have entirely failed to show any breach of the contract on the part of the defendants; and I come further to the conclusion that even if they had shown a breach in the clause of the contract to work the colliery efficiently, their remedy would have been at law and not in this court. With regard to the minor point, as to working the different seams of coals at the same time, that was the subject of a motion made in 1865, before Sir Richard Kindersley, immediately after the filing of the bill. The substance was, that they were working improperly and not according to the stipulation contained in the lease. Sir Richard Kindersley, after full argument, dismissed that motion and made the defendants' costs in the cause, but he refused the plaintiffs their costs.

Therefore there is the adjudication of Sir R. Kindersley upon the point that there is no improper working; and I make the same observation as regards that, that if they are working the mines contrary to the stipulations in the covenant, unless indeed they are doing something so unwarranted that the court can not interfere by injunction, the remedy is not in this court but in a court of law.

My opinion is, that the remedy of the plaintiffs by this bill is misconceived, the bill fails in its object, the sole object being to compel a more extended working by the defendants; and upon all these grounds, being of opinion that the bill fails it necessarily follows that it must be dismissed.

Upon the question of costs, the vice chancellor referred to a negotiation which had taken place in the year 1866, for the

settlement of the points in dispute in this cause, when it was agreed that the bill should be dismissed upon payment by the plaintiffs of £400 toward the defendants' costs, but that agreement had subsequently fallen through in consequence of the plaintiffs' insisting upon a right to file another bill having the same object as the first. The vice chancellor said he considered it a most unfortunate thing that this litigation had been continued after it had, as he considered, been fairly and honorably brought to a conclusion in 1866. But as he had decided that the suit had been commenced erroneously and had failed, it must follow the general principles, and must be dismissed with costs.

The vice chancellor also referred to a point which had been raised, that the defendants were bound to work the ironstone because it had been included in the demise to them, although from there being no sale for it in the neighborhood, and no iron furnaces in the district, the ironstone was entirely useless to them. His opinion was, that the defendants were not obliged to work the ironstone, and therefore the plaintiffs' contention in that respect likewise failed.

Solicitors for the plaintiffs, **MESSRS. COVERDALE & Co.**

Solicitor for the defendants, **Mr. WILLOUGHBY RAIMONDI.**

THE LYKENS VALLEY COAL CO. v. DOCK, ASSIGNEE, ETC.

(62 Pennsylvania State, 232. Supreme Court, 1869.)

¹ **Coal broken becomes personalty.** L. leased coal mines to F., to have "the right to mine, carry away and dispose of " coal. F. having mined coal, which remained in the mine just as it fell from the breast, made an assignment for creditors: *Held*, that the coal was personal property and passed to the assignee, and trover would lie for it against L. to prevent its removal, provided its removal did not essentially injure the mine.

² **Idem—Removal of loose coal by assignee subject to lessee's covenants.** If the coal could not be removed without material injury to L., F.'s right

¹ *Riley v. Boston Co.*, 11 Cush. 11; *Crouch v. Smith*, 1 Md. Ch. 401.

² *Huddell, in re*, 16 Fed. 373.

of property was not complete and final, because of his obligation to mine in the most approved method and leave the mines in good order.

¹ **Measure of damages—Coal severed belongs to the tenant.** In trover against a lessor for converting the loose coal on hand at time of entry for a pretended forfeiture, the court charged, upon the question of damages: "You allow, not for the expense of mining, but for the coal as mined lying in the run. This includes the value of the coal itself—what might be called "coal leave," for although not paid for, it belongs to the tenant: *Held*, under the circumstances, no error.

Offset of rent in trover. In trover against the lessor for taking his tenant's coal, rent can not be allowed as an offset.

Right to use tramways. Where the coal upon severance has become the property of the lessee he has the right to enter and remove it, and to use the tramways for such purpose.

² **Forfeiture not retrospective.** An entry for forfeiture can not be made the means to divest the rights of property in the lessee already vested.

Error to the Court of Common Pleas of Dauphin County.

This was an action of trover by Gilliard Dock, assignee for the benefit of creditors of The Franklin Coal Company, against The Lykens Valley Coal Company. The writ was issued to November term, 1886. On the 1st of February, 1865, The Lykens Valley Coal Company leased to The Franklin Coal Company the coal lands, houses, improvements, together with the breaker and machinery belonging to the lessors, the lease to continue for fifty years. By the 3d section the lessees are to have the right to mine and carry away and dispose of coal they may mine from the land leased, the lessees to pay \$45,000 per annum, monthly, for the first six years in advance, with an increased rent thereafter as set out in the lease; and in addition for each ton of coal mined over 150,000 tons in each year, a royalty of thirty cents per ton; the rent to be paid "without deduction arising from any defect or fault in the coal veins, or from any other cause, matter, or thing whatever."

"The lessees to make, procure and set up, at their own expense, all necessary improvements for developing said coal lands and mining the coal thereon, to keep the breaker, slope-house, tenant-houses, wharves and shutes at Millersburg, together with the engines, chains, and all the machinery of the breaker and in the slope-house in good order, repair and con-

¹ *Jegon v. Vivian*, 8 M. R. 628.

² Party claiming forfeiture must have fully performed his part: *Booth v. Chapman*, 59 Cal. 149.

dition during this lease, and deliver up the same at the expiration thereof in like good order and repair, reasonable wear and tear only excepted; they are also to manage and conduct the mines and the mining of coal, as also the sinking of any new slopes or lifts in the present, or any other slopes hereafter opened, or opening or driving any tunnel or gang-ways, in the most approved method of modern mining, with due regard to ventilation, drainage and propping, and to deliver up the said mines, as well those now opened as those hereafter to be opened by them, in good order and condition at any termination of this lease, reasonable wear and tear only excepted." *
* *

By section 9, all the rolling stock, cars, loose tools and other personal property are to be taken as part of the lease, an inventory of these articles being annexed to it, the lessees at their own expense to keep these articles in repair and substitute others of equal value when any are injured or destroyed, and the original articles and those substituted to be the property of the lessors, who may take possession of them in case any part of the rent should be unpaid when due; and if "the lessees, their successors or assigns," should attempt to remove this property from Dauphin county, or if any judgment should be recovered or attachment issued against the lessees, etc., under which their interest in the personal property should be seized or attempted to be seized, etc., the lease of the personal property shall be terminated and the lessors may at once take possession of it, and enter upon the leased lands for that purpose. The lease was not to be assigned except by consent of the lessors. By the 14th section of the article it was agreed "that all improvements made by said lessees, their successors or assigns, to the present works of said company, and the machinery thereof, and every breaker, slope-house, engine and machinery and buildings, or improvements whatever, now erected or hereafter to be erected by said lessees, their successors or assigns, on the property hereby leased, shall be deemed and considered the property of said lessors, etc., and shall at the termination of this lease, from any cause whatever, etc., inure to the benefit of said lessors, etc., and shall be deemed, taken and considered as the property of said lessors, etc., without any compensation whatever therefor, to said lessees, their successors or assigns."

By the 15th section it was provided that if the rent remained due for thirty days, the lessors might take possession of the premises, and if the lessees refuse to deliver possession, the lessors might bring an action for ejectment, and the lessees, by the same section, gave a warrant to confess judgment in the action of ejectment.

On the 3d of August, 1886, the lessees made an assignment for the benefit of creditors to Dock, the plaintiff. The lessors afterward entered and took possession of the personal property claimed by them. There was quite a number of articles, amongst which were a turning-lathe and (as the jury found) 8,000 tons of coal. There was evidence as to the character of the ownership and possession of the articles claimed, and also of the different methods of mining—whether by “the run” or by wagon, and the cost respectively; that when working by “the run” the coal came out more in a solid mass with dirt and stone which required separation; that removing what was in “the runs” would leave the upper part of the vein inaccessible; the mining here appeared to have been by “the run.” The assignee claimed the articles of Savage, the superintendent of the lessors, who informed the assignee that he had received orders not to permit anything to be taken from the premises; Hoffman, the president of the defendants, notified the assignee that he would resist the removal of the coal; he said it would injure the mines to remove it, and denied the assignee’s ownership; he claimed it for rent unpaid. The assignee asked the president if he could not take the coal out. The president replied that he could not have the use of the gangway to take it out.

These mines were afterward worked by Edward Savage, who testified that by his contract with the defendants he was to have all the mined coal, and that he took away twenty-seven loads. There was evidence of the value of the coal and the other articles. As to this and the cost and proper method of mining, and as to the injury to the mines by the running the coal, the evidence was conflicting.

PEARSON, P. J., after preliminary remarks on the form of action and the evidence, charged, * * “Until the coal is mined it remains real estate. As soon as severed it becomes per-

sonal property, although not removed from the runs. * * There were many of these runs, and generally full of the mined coal, which was to be removed from the lower end, next the gangway, and would come down to the opening by its own weight, the angle of descent being quite steep. At the time the mining ceased they had not reached the open end of the mine with any of the runs, and it would seem that the coal had been left in the runs the better to enable the laborers to mine the remainder. [We have no hesitation in saying that this mined coal in the runs was personal property, could have been removed by the tenant, and passed by the general assignment to Mr. Dock, who had the right to remove it notwithstanding the re-entry by the landlord—the Lykens Valley company—provided it could be done without essentially injuring the mines.] The right to mine and remove the coal is secured in terms by the third article of the contract, but independently of this provision it would exist from the general terms of the lease. You have heard the opinion of the witnesses as to the facility and difficulty of mining the residue of the coal after this is removed from the runs; some express the opinion that it could be readily done, and point out the means; others that it could not be mined without great expense and risk. You must judge between them. You are instructed that if this coal could be removed without doing material injury, the Lykens Valley company was bound to permit the assignee to remove it. If the injury would be essential, rendering it impossible or very difficult and dangerous to take out the residue of the coal, the company—the owner of the mines—could lawfully forbid its removal, at least for the time being, and until the residue could be worked out. Such refusal to permit the coal to be removed would not be a conversion. If it would not essentially injure the mines to remove the coal in the runs, the refusal by the president of the company, and those having charge of the mines, to permit it to be done, would be evidence of a conversion. That subject will be next explained. It is contended by the defendant's counsel that there is no evidence in this case from which the jury can find a conversion of the property sued for. A demand by the owner of personal property for its delivery, made on the person having it in possession, and a refusal

by him so to do, is evidence of conversion—matter from which the jury should infer it, unless some legal reason is given for the non-delivery. It is not of itself a conversion. But an actual conversion of the goods is sufficient, without proof of a demand—as by using, consuming or selling them. Mr. Dock testifies that after the assignment to him, he demanded the goods now claimed from Mr. Hoffman, president of the Lykens Valley Coal Company. “* * We have already fully instructed you as to the right of the Lykens Valley company to retain the coal in case the removal would seriously injure the mines. We are unable to see from any evidence in the case that it was owned by the defendant, or that it possessed the right of retention on any other grounds than the danger of injury. It had taken no measures to dis-train it for rent.”

After referring to the evidence on the question of conversion, the judge proceeded:

[“In addition to this, Mr. Edward Savage testifies that on leasing the mines the Lykens Valley company sold him all of this coal in the runs; he removed a portion and had liberty to remove all. The sale of the goods of another person is strong evidence of conversion by the *vendor*. On the whole, we decline to charge you as requested, that there is no sufficient proof of a conversion of any of these goods by the defendant, but on the contrary we think that there is strong evidence of conversion, and such from which you may properly infer it, if you believe the witnesses.]

[“We are also asked to instruct you that trover is not the proper remedy in this case, but the Franklin Coal Company or its assignees must bring an action on the contract. Trover is the common and very proper remedy by an assignee in bankruptcy or insolvency to recover the goods belonging to his assignor, the bankrupt. In such action there can be no set-off. This is right, as the assignee sues for the benefit of creditors, and to carry out the trust. Were he to sue on the contract, the general indebtedness of the Franklin company to the Lykens Valley company could be set off, which would be improper as to the creditors, whom the company making the assignment had the right to prefer under our laws. We

decline to charge as requested, but say that the assignee can support this form of action—need not sue on the contract.]

“If on the principles stated and the facts submitted you find a verdict in favor of the plaintiff, the next question is as to the measure of damages. This, in an action of trover, is generally the actual cash value of the property at the time of the conversion, to which may be added interest from that period until time of trial. The giving of interest is measurably optional with the jury under all the circumstances. It may be, and often is, in hard cases, refused.” * *

[“You allow, not for the expense of mining, but for the coal as mined, lying in the run. This includes the value of the coal itself—what might be called ‘coal-leave;’ for although not paid for, it belongs to the tenant. This may seem hard, but is no more so than every other case where goods are sold and delivered to a bankrupt whose assignee will take them in preference to the vendor, who has delivered them without payment; should they be returned by the purchaser to the vendor, the assignee can recover their value in trover.]

[“Hoffman (the president of the Lykens Valley company) refused the use of their underground road, their cars, etc., to remove the coal. We are of the opinion that under the contract and the circumstances so far as developed, the Franklin company was entitled to the use of the roadway to remove the coal from the mines; such right would not, however, give it or its assignee the right to use the cars of the company to remove or their breaker to prepare the coal. We are of the opinion that he had a right to use the general railroad within the lines for that purpose, provided the business was so conducted as not materially to interrupt the other company in its business.] How the Lykens Valley company acquired possession of the mines is not in proof. It is quite probable that its agents re-entered on the failure of the Franklin company; but such re-entry would not give it the right to the personal property of the latter company, found on the ground and previously assigned to Mr. Dock for the use of the creditors.”

The verdict was for the plaintiffs for \$6,875.36. The jury returned with their verdict this paper, which was filed:

“We find for the plaintiff as follows:

LYKENS VALLEY COAL CO. v. DOCK. 577.

2 pieces of best chain.....	\$ 10.00
1 small piston.....	5.00
2 brass packing rings, 18 inches in diameter....	35.00
2 " " " 16 " " "	30.00
6 brass valves.....	10.00
$\frac{1}{2}$ of turning lathe and tools.....	150.00
1 lot of screen bars.....	20.00
1 stove.....	12.00
101 feet of log pipe.....	25.25
8000 tons of coal:.....	6,000.00
Interest from Sept. 15, 1866 to March 27, 1868	579.41
	\$6,876.66"

The defendants removed the case to the Supreme Court, and assigned for error the portions of the charge included in brackets.

R. A. LAMBERTON, for plaintiffs in error.—Detaching the coal from the solid bed did not, *ipso facto*, make it personal property; the assignor could not have removed it, and the assignee was in no better position: *Twelves v. Williams*, 3 Wharton, 485; *Vandyke v. Christ*, 7 W. & S. 373; *Ludwig v. Highley*, 5 Barr, 137; *Rogers v. Gilinger*, 6 Casey, 187. A tenant may remove fixtures: *Hill on Real Prop.*, 67; 2 Kent's Com., 343; *Whiting v. Brastow*, 4 Pick. 310. Although demand and refusal be evidence of conversion, yet when there is no actual conversion, trover will not lie: *Wilbraham v. Snow*, 2 Saund. 47, e. note; *Mires v. Solebay*, 2 Mod. 244; *Buller's N. P.* 44; 2 Leigh's *N. P.* 1485; Bacon's Ab. "Trover" 681; *Isaac v. Clark*, 2 Bulstrode, 310; *Mather v. Trinity Ch.*, 3 S. & R. 515; *Lyon v. Gormley*, 3 P. F. Smith, 265; *Forsyth v. Wells*, 5 Wright, 294; *Wright v. Guier*, 9 Watts, 172; *Sanderson v. Haverstick*, 8 Barr, 294; *Stafford v. Ames*, 9 Id. 343; *Backenstoss v. Stahler*, 9 Casey, 251. The action should have been on the contract: 1 Chitty's Pl. 97. The value of the coal in place should have been deducted from the whole value of the coal as it lay: *Lyon v. Gormley*, *supra*; *Herdic v. Young*, 5 P. F. Smith, 178.

J. H. BRIGGS, HAMILTON and L. B. ALRICKS, for defendant in error.—Trover was the proper form of action: *Lyon v.*
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Gormley, Forsyth v. Wells, supra. Sale is evidence of conversion: 2 Saunders Pl. & Ev. 882. An agent is liable in trover though acting by the principal's order: *Perkins v. Smith*, 1 Wilson, 328; *Stevens v. Elwell*, 4 M. & S. 529; 2 Greenleaf Ev., Sect. 642; 1 Chitty's Pl. 176. Trover lies notwithstanding the lease: 2 Saunders Pl. & Ev. 870, 877.

The opinion of the court was delivered, July 6th, 1869, by AGNEW, J.

There was no error in the court charging that the mined coal was personal property, passing under the assignment for the benefit of creditors, and subject to be removed by the assignee, qualified as the instruction was that this could be done without essentially injuring the mines. The very purpose of the lease, expressed in terms, was to enable the Franklin company to mine, carry away, and dispose of the coal. The separation of the coal lying in the runs from the mass of coal in place was the result of a large expenditure of money and labor in the preparation for mining, and also in the mining of it. It was no longer a part of the coal in place, but lay in the breasts ready for transportation. It would be unjust if, after the tenant had done all this, the mined coal were still to be treated as a part of the realty, except so far as it would be necessary to carry out the covenants in the lease. If the coal could not be removed without material injury to the lessor, we would have to assume that the tenant's right of property was not complete and final, because of the covenant (in this instance expressed) to manage and conduct the mines and the mining of coal in the most approved method of modern mining, and to leave the mines in good order and condition at any termination of the lease. On the question of proper mining much evidence was given and different opinions expressed. The court fairly submitted to the jury the question of fact, whether the mined coal could be removed without material detriment to the mines.

It does not appear that the judge misstated the testimony of Edward Savage, in charging on the question of conversion. It is true Savage says he preferred mining the coal for himself to taking the coal there for nothing. In his opinion, the coal in the runs could not be prepared for market without in-

injuring the reputation of the mines. But on the point of sale by the defendants, of the mined coal, which was the material one in regard to the conversion, he does say, first in chief, (p. 35) he had the right to remove it; and then, in cross-examination, that the company gave us permission to take all there, solid and *mined* coal—that is my construction of *our contract*. They did not object to our taking what we took—twenty-seven loads—we were to have all the *mined* coal there.

The conversion being established—and the jury have found this fact on evidence sufficient to be submitted to them—trover was the proper form of action. The coal being found to be the property of the plaintiff, upon sufficient evidence and proper instructions, and the conversion by the defendants and their refusal to permit the assignee to carry it away, the right of action in this form is complete.

In allowing the jury to find for the plaintiff the actual value of the coal as it lay in the breasts, and not the cost of mining, assimilating it to the value of coal-leave, as it is known, the court did the defendants no injustice. This was clearly the lowest form in the expression of value that could be given to it. It gave the defendants all the advantage of the mined coal without the expense and labor of superintending its mining. The right to a deduction from this value, of rent unpaid, can not be conceded in this form of action. There is a plain distinction in measuring damages between property rightfully acquired and that taken wrongfully. The latter was the case in *Herdic v. Young*, 5 P. F. Smith, 178, cited in the argument. The doctrine held there was that in the case of an inadvertent trespass, where no damages ought to be allowed beyond compensation for any outrage in the taking, it would not be just that the owner should be allowed the value added to the article by the labor and expense of the trespasser, beyond a proper compensation for the value of the thing when the trespass was committed. There just compensation required a reduction from the superadded value, so as to bring the damages nearer to the true standard of loss suffered by the plaintiff. But here there was no trespass, inadvertent or willful, but a rightful reduction to the possession of the Franklin company, by virtue of the lease, as its

own property. There was no wrong in the taking to be compensated for, and no right of reduction in the value growing out of the state of the property itself. The rent which the defendants asked to be used in the reduction of the value of the coal was an independent demand wholly disconnected from the taking of the coal. Its deduction would be on the principle of a simple set-off, and not an equitable defalcation from the gross value. Such a set-off can not be made in trover.

We think the court charged correctly also as to the right to use the railroad in the mines to remove the coal, qualified by the instruction that the use should be such as not to interrupt the defendants in the use of the mine. To have held otherwise would be simply to say that the mined coal could be used by no one. It being the property of the plaintiff the defendants would be liable if they converted it, and if the plaintiff entered to take it, he would be a trespasser. This would be unreasonable and inconsistent with the purpose and terms of the lease. *Lex non patitur absurdum*. The coal being lawfully mined the lessees had a right to remove it by the terms of the lease, and through the means and appliances sanctioned by its terms. The lease did not expire by efflux of time, so as to warn the lessees not to leave their work unfinished. If the defendants regained possession of the mines rightfully, a fact not clearly appearing in the evidence, yet a reasonable construction must be placed upon such a right of entry, that it should not be used as a penalty to forfeit all rights acquired before the entry. The property in the mined coal having already vested under the lease, the means of taking it away provided in the lease, which gave the possession and use of the mines and all their fixtures, machinery and appliances, must be construed to remain a sufficient, reasonable time to enable the lessees to remove their property. The means reserved by the lessors in this lease to recover possession on the breach of certain covenants, are exceedingly sharp, stringent and speedy. They are not to be permitted to be used to destroy all the lessee's rights of property, disconnected as they may be with the particular breach which was enforced by re-entry. This is not a case of option, where the removal could be effected by other means. The railroad is the only available means of ingress and egress to remove the coal, and

necessity requires its use. *Necessitas facit licitum quod alias non est licitum. Necessitas quod cogit defendit.* An equitable and reasonable interpretation must therefore be given to the terms of the lease. *Lex aliquando sequitur æquitatem.*
Judgment affirmed.

JOSEPH SHELDON V. C. M. DAVEY AND EVAN D. JONES.

(42 Vermont, 637. Supreme Court, 1870.)

Tenant overstepping bounds—Notice to quit. Jones, one of the defendants, having a lease of a certain portion of the complainant's slate quarry paying at an agreed rate per square for all slate quarried and manufactured therefrom, without obtaining consent thereto opened another portion of the quarry adjoining the demised premises, and for several years quarried slate therefrom,¹ *paying rent* at the same rate as he paid for slate from within the bounds of his lease: *Held*, that such use of the quarry outside of the lines of his lease did not constitute him a tenant from year to year; that the only interest he acquired was a right to remove that portion of the slate, which he had been to the expense of uncovering, and that he was not entitled to the statutory notice to quit, but only to a reasonable time to get the slate he had so uncovered.

Idem—Waiver of notice. *Held further*, that having agreed to quit that portion of the quarry in dispute by a day certain, such agreement was a waiver of all claim for further time to work and remove the slate.

Measure of damages against overstepping tenant. *Decreed*, that the defendants must account for all slate taken from outside of the demised lines since the date they had agreed to remove, at what it was worth at the date when taken from the quarry.

BILL IN CHANCERY. The bill set forth that the orator was the owner of a valuable slate quarry, situated in Fairhaven, in the county of Rutland; that on the 24th day of February, 1859, he leased a certain portion thereof to the defendant Jones, by lease in writing, thereby giving said Jones the right to quarry and manufacture slate therefrom at a certain price per square, the orator agreeing to haul said slate to the railroad depot and reserving a lien thereon to secure the pay-

¹*Lockwood v. Lunsford*, 7 M. R. 532.

²Receipt of rent creates tenancy: *Doe v. Morse*, 1 Barn. & Ad. 365.

ment of the stipulated price, for the term from said date to September 1, 1868; that said Jones entered into possession of said leased premises and quarried slate therefrom until about the 1st day of October, 1861, when, without authority, he entered upon a certain other portion of said quarry, south of and adjacent to said leased premises, and quarried slate therefrom without right until the 1st day of June, 1864, when he sold and conveyed an undivided two thirds of his interest in said leased premises, and also an undivided two thirds of his pretended interest outside thereof to the defendant, Davey; that said Jones, while quarrying outside of said leased premises, was from time to time forbidden by the orator to quarry there, but kept on and accounted and settled with the orator for the slate made therefrom the same as if made from the leased premises and according to the terms of said lease; that on the 15th day of May, 1864, the orator gave said Jones notice that he must quit that portion of the quarry outside of said leased premises, else he should commence a prosecution against him therefor; that in consideration the orator would forbear to prosecute him; Jones agreed to quit the possession thereof and stop making slate therefrom on the 1st day of July, 1864; that said Davey and Jones, from said first day of July, both by night and by day, held forcible and unlawful possession of said portion of said quarry outside of said leased premises, and quarried and manufactured a quantity of slate therefrom, and threatened to continue quarrying therein, and to keep the orator out of the possession thereof by force; that said portion of said quarry had been worked in a southerly direction from said leased premises by sections, the sections being narrow and running easterly and westerly across the quarry, and the defendants had been from time to time in possession of no part of said portion of said quarry south of the section upon which they were at work, and the defendants were insolvent.

Prayer for an accounting for all slate made and disposed of by the defendants outside of said leased premises since July 1, 1864, and for an injunction to restrain the defendants from disposing of the slate on hand made therefrom since said 1st day of July, and from further quarrying therein and obstructing and hindering the possession and use thereof by the orator.

The answers of the defendants admit some of the allegations of the bill and deny others, and aver that the defendant Jones, with the knowledge and consent of the orator, and with his pecuniary assistance to some extent, expended several thousand dollars in developing said portion of said quarry outside of said leased premises more than he realized from all the slate made therefrom, and which will be an outright loss unless he can have the occupation and use thereof and the slate therein; and also that said Jones, on the 22d day of February, 1864, with the knowledge and consent of the orator, sublet by contract in writing a portion of the quarry in dispute to certain parties, to work at a certain price per square, and that said Jones had made large advances to said parties to enable them to carry out said contract.

The answers were traversed, and testimony was taken by both parties. The material facts proved are stated in the opinion of the court except that it appears from the evidence that the portion of the quarry in dispute had been worked by sections, the dirt and top or waste rock being first taken off from a section of the quarry, which operation is attended with more or less expense; the section is then finished, all the slate being taken therefrom before another one is commenced. The quarry was thus worked section by section, the sections being narrow and running easterly and westerly across the same. The case was heard on bill, answers, replication and proofs. The court of chancery at the September term, 1866, KELLOGG, Chancellor, decreed *pro forma*, that the bill be dismissed with costs; from which decree the orator appealed.

PROUT & DUNTON, for the orator.

EDWIN EDGERTON, for the defendants.

Argued at the January term, 1867.

The opinion of the court was delivered by WILSON, J.

This is a bill in chancery to restrain the defendants from further quarrying slate upon the quarry in dispute; from selling the slate manufactured therefrom, and for an account.

The principal question is, whether the interest acquired by the defendant Jones in the premises, by his entry upon and occupation of the quarry, outside of the written lease, has expanded into a tenancy from year to year. It is insisted by the defendants that there is such an implied tenancy, arising from the manner of the entry upon and occupation of the premises by Jones, and from acquiescence on the part of the orator in such occupancy as entitles the defendants to the possession of the premises. It appears that the defendant Jones, in the fall of 1859 or spring of 1860, commenced quarrying and manufacturing slate upon that part of the quarry in dispute, and continued to manufacture slate thereon until some time in the spring of 1864. The orator drew the slate from the quarry to the depot in Fairhaven, upon the same terms as those described in the written lease. It appears that Jones, from time to time during this entire period, made statements to the orator of the slate quarried and manufactured from that part of the quarry, and paid him for each square at the rate specified in the written lease. The written lease provided, among other things, that the orator should have a lien and claim upon all the slate which should be manufactured from the quarry, covered by the aforesaid lease, by Jones and his assigns, for whatever should be due for slate manufactured thereon by him or them, and drawn to the railroad by the orator, and that the orator should have a lien upon the slate for any and all advances which he should make to Jones from time to time to enable him to carry on the business of working the quarry embraced in said lease. The orator did make advances from time to time, according to the understanding of the parties, as expressed in said instrument.

It is unquestionably true that a part of the money so advanced was expended by Jones in developing or in quarrying and manufacturing slate from that part of the quarry in dispute. The orator asserted and enforced the same lien upon the slate manufactured from that part of the quarry in dispute that the terms of the lease gave him upon the slate quarried and manufactured from the territory covered by said lease. The defendant Jones agreed with John S. Jones and others (Exhibit 1), and with Owens and others (Exhibit 2), to work portions of the quarry in dispute. The orator was, soon after

the making of the agreements contained in said exhibits, informed that some arrangement had been entered into by said parties in respect to quarrying slate, but it does not appear that he was informed of the terms of their agreements until late in the spring of 1864. We do not find any express agreement between the orator and Jones for the occupancy by the latter of any portion of the premises in question, nor do we find that the orator ever consented to Jones making any opening of the quarry outside of the leased premises. It appears that Jones entered upon the premises in dispute and commenced working or uncovering portions of that part of the quarry, without the knowledge or consent of the orator. The orator, soon after Jones commenced quarrying there, was informed of his operations, and suffered him to go on and finish the sections commenced, and treated the slate when taken out the same as those taken from that part of the quarry covered by the written lease. It is clear that all the openings made by Jones of the disputed quarry were made without any agreement with or authority from the orator, but he having commenced quarrying there, was suffered by the orator to go on and remove what slate he had developed.

This appears to have been the character of his entries upon and occupation of that part of the quarry from the time of his first entry to the time the orator notified him, in the spring of 1864, to quit the premises. There was no agreement to pay rent, no recognition of yearly rent, but payment was made per square for the slate actually manufactured. No express or implied agreement is shown between these parties which would have prevented Jones from quitting the quarry at any time, and it will hardly be claimed that the orator could compel the defendants to pay rent any longer than they occupy the quarry, or to pay for slate not manufactured or quarried. It is said that the defendant Jones understood he was to have the use and occupancy of that part of the quarry in dispute until the expiration of the written lease. But we think he could not well understand or infer that he was entitled to such extended use and occupation of that part of the quarry, in the absence of any contract and without any obligation on his part to work the quarry during the whole of that period. There is nothing in the case which shows that

the orator expected, or that he had any right to expect the defendant would make a new opening when he had finished one already commenced. We do not find that the orator made any advances to the defendant to enable him to develop any portion of the quarry outside of the written lease. That he made advances to him, while he was quarrying and manufacturing slate he had uncovered without permission, is true, but those advances are so fully explained by the circumstances under which they were made that they constitute no recognition of any right on the part of Jones to extend his operations. The drawing of the slate, the acceptance of the same price for those slate that was stipulated for the slate in the leased quarry, and the enforcement of the lien by the orator, are consistent with limiting or restricting the defendant's right or interest to such portions of the quarry as he had already developed. It is insisted by the defendants that the orator ratified and adopted the leases marked "1" and "2," and is estopped from asserting any claim inconsistent with the full enjoyment of the benefit of those leases by the respective parties thereto. The defendants can claim no right as against the orator by reason of either of those leases. As to the other parties thereto, it is not shown that they were, by any act or declaration of the orator, induced to enter into any such stipulations with the defendant Jones. The orator had made no line on the disputed quarry, nor assented to any line there to which either Jones or his lessees might work; but the right of the defendant Jones, and the extent of his right to the quarry, had become matter of record, of which the sub-lessees had notice, or were affected with notice. If they saw an opening of the quarry made by Jones outside of his written lease, they had no right to infer that his right to that part of the quarry extended beyond such opening. They knew, or had the means of knowing, that the portion of the quarry they stipulated to work was not covered by the written lease of the orator, and they should have made inquiry of the orator, before entering into any such contract with the defendant Jones, as to Jones' right and the extent of his right to the premises. We do not find that the orator had such knowledge or information as to the extent of the defendant Jones' claim, or that of his lessees, as

would justify us in holding that the orator acquiesced in his or their occupancy of the premises.

We are of opinion that the interest acquired by the defendant Jones has not expanded into a tenancy from year to year. What interest, then, did the defendant Jones acquire in or to the quarry in dispute? He acquired an interest in that part of the quarry to which his operations were from time to time confined, so far as the orator, by allowing him to work the sections commenced and receiving pay for the slate manufactured there, ratified his acts. There is nothing in the case to show that the orator was under any obligation to allow the defendant to go on and quarry slate upon this part of the premises, except that if he allowed the defendant to commence a section, or allowed him to go on quarrying a section he had commenced, he was bound to let him finish it. But the defendant's interest in this part of the quarry extended no further than the openings made by him, and subsequently ratified by the orator. Beyond such openings and quarrying thereon as were ratified by the orator the defendant had no interest or right to go. His right and interest ceased when he had finished the sections the orator allowed or suffered him to work, and he could claim no right to uncover any other part of the quarry in dispute. This being the nature and extent of the defendant Jones' right or interest, he was not, as a matter of course, entitled to six months' notice to quit. He was entitled to reasonable time to quarry and manufacture the slate he had uncovered and the orator had allowed him to commence working. We think he had reasonable time, prior to the first day of July, 1864, to finish quarrying and manufacturing the sections commenced before the orator gave him the notice to quit. This was all the time he could legally require, and the defendants could not require, nor could either of them require the orator to give him or them notice to quit in order to terminate his or their right to commence opening and quarrying a new section, because they never had any such right.

But there is another ground on which the orator is entitled to relief. It is clearly established by the evidence that Jones agreed to quit the quarry in dispute on the first day of July, 1864. He thereby waived all claim for further time to

work that part of the quarry, and all claim for the possession of it after that date.

We are of opinion that the orator is entitled to the relief prayed for, and that the defendants ought to account for all the slate taken from the quarry, outside of the written lease, since the first day of July, 1864. The result is that the decree of the chancellor is reversed, and the cause is remanded to the court of chancery, with a mandate directing an interlocutory decree that the defendants account before a master for all the slate taken from the quarry, outside of the written lease, since the first day of July, 1864. The defendants are to account for the slate quarried and manufactured on that part of the quarry prior to July 1, 1834, and taken away since that date, at fifty cents per square; and they are to account for all slate quarried, manufactured and taken away from that part of the quarry since the first day of July, 1834, at what the slate were worth at the respective times when the same were taken from said quarry.

NOTE: The special master appointed to take the account in this case reported that the working of slate quarries is attended with considerable risk owing to the liability to encounter unsound rock, etc., and that the portion of the quarry in dispute at any time *prospectively*, during the period it was occupied and worked by the defendant, was not worth and could not have been leased at a higher rate than seventy-five cents per square; that no one would have engaged in advance to pay a higher rate, taking the unknown risk of working the quarry, and on this basis of computation found due the orator. \$3,121.83.

He also reported the market value of the slate made by the defendants from said quarry, from month to month delivered at the railroad depot in Fairhaven, and the actual cost of manufacturing and delivering the same; and computing the damages on this basis, by deducting said cost from said market value, he found due the orator, \$13,610.32.

The master also reported that when the defendants quit possession of the quarry in December, 1836, they left slate rock enough for one hundred squares of slate exposed to the action of the frost, whereby the same was destroyed, and that it was worth \$200; that the defendants also left a large amount of rubbish in the quarry which had to be removed at an expense of \$300 to the orator.

The extent of the defendant's liability on the aforesaid facts was submitted by the master to the court, and the amount found due the orator by him was in the alternative depending upon the decision of the court.

The court of chancery at the September term, 1869, PIERPOINT, Chancellor, decreed *pro forma* that the defendants pay the orator \$14,110.32, it being the market value of the slate delivered at the depot, after deducting

ARDESCO OIL CO. v. NORTH AMERICAN OIL AND
MINING CO.

(66 Pennsylvania State, 375. Supreme Court, 1870.)

Waiver of set-off, to save forfeiture. A sub-lessee of premises subject to forfeiture for non-payment of royalty and other debts in arrear, in consideration of obtaining his sub-lease, covenanted to pay the royalty in arrear and accruing rent and the other debts. In suit on his covenant it was *held* such agreement implied a waiver of his right to plead a set-off.

Suit on covenant, for use. A covenant under seal can be sued only in the name of the covenantee, but where sued on for the use of others, the court will control the execution so as to see the proceeds properly applied.

Specific consideration, distinguished from rent. A covenant to pay moneys already due to others as the consideration of a sub-lease, will not be construed like rent, to become due after the land has been enjoyed; they must be considered as intended to be paid either forthwith or within a reasonable time.

Sub-lessee held as principal debtor. By the obligation of the sub-lessee to pay his lessor's debts, he became the principal debtor, and his lessor the surety, and was bound on demand to exonerate his lessor, although the original creditor may not have demanded payment.

Pennsylvania equity practice. Vesting a separate equity jurisdiction in the courts has not changed the rule that equity is part of the law of Pennsylvania and may be administered by common law forms.

Practice—Suit on indemnity bond. The obligee in a bond to indemnify against claims may sue as soon as a claim is made, without waiting for judgment or even till a suit be commenced.

the cost of manufacturing and delivering the same, together with the value of the slate destroyed by the frost, and the expense of removing the rubbish from the quarry, from which decision the defendants appealed.

The case was argued at the January term, 1870, of the Supreme Court, by E. J. Phelps for the defendants, and W. C. Dunton for the orator.

The court, without delivering any opinion, reversed the decree of the chancellor with costs in the Supreme Court, and held that the defendants should pay the larger amount found due by the master for the slate, it being their market value at Fairhaven depot, after deducting the cost of manufacturing and delivering them, but disallowed the claim for the slate destroyed by the frost, and for removing the rubbish from the quarry, and remanded the case by mandate directing that a decree pass for the orator on the report of the master for the sum of \$13,610.32, and interest from the date to which interest was computed by the master.

REPORTER.

¹ **Extent of corporate powers.** A corporation, unless expressly restrained by law, has an unlimited power over its property and may dispose of it as fully as a natural person.

² **Assignment by corporation.** An insolvent corporation may make an assignment for the benefit of creditors; the power may be exercised by its directors.

November 3, 1870. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny County, No. 63, to October and November term, 1869.

On the 30th of May, 1868, The North American Oil and Mining Company, for the use of Francis H. Macy, trustee of Josiah Macy's sons, brought an action of covenant against the Ardesco Oil Company. The defendants pleaded *non est factum*, covenants performed *absque hoc*, set-off, payment with leave, and an additional plea denying the validity of the transfer by the legal to the equitable plaintiff of the lease sued on.

The facts of the case are as follows:

On the 13th of January, 1858, E. F. Denny leased to J. F. Johnston, for fifteen years, a coal-right under a tract of land in Armstrong county, he to pay every six months one third of a cent per bushel for the coal mined, and if the rent should be unpaid for thirty days after demand, the lessor might enter and the lease be forfeited. On the 1st of July, 1859, the North American company accepted the lease from Johnston "subject to all conditions." On the 11th of April, 1866, the North American company mortgaged the premises to Francis H. Macy, in trust for Josiah Macy's sons, to secure a bond in the penalty of \$150,000, conditioned for the payment of \$25,000, with interest payable semi-annually, and for all such further advancements as Macy's sons should make to the company, with interest, in the aggregate amounting to \$75,000, with proviso that in default of payment of any installment of interest for thirty days, the mortgage might be sued out.

On the 1st of July, 1867, the North American company leased the premises to the defendants for two years:

"In consideration whereof the said Ardesco Oil Company

¹ *Wood Hydraulic Co. v. King*, 3 M. R. 618.

² *Savage v. Ball*, 2 M. R. 579.

agrees to pay and discharge all arrears of interest due and owing on a certain mortgage for \$25,000, held by Josiah Macy's sons against the party of the first part, together with all interest that shall accrue during the term of their lease. Also to pay and discharge all cash advanced by said Macys for insurance on the premises. Also to pay all arrearages of taxes due on the demised premises as well as all taxes that shall be assessed during the term of this lease. Also to pay all rents due on the demised premises to Mrs. Elizabeth F. Denny, and such as shall become due and payable on the same during the term of this lease. Also to pay whatever sums, if any, shall be due persons for labor on the premises. Also to keep the premises insured to a reasonable amount in some responsible insurance company during the lease." * *

On the 9th of March, 1838, the North American company assigned all their interest in this lease to Francis H. Macy, trustee for J. Macy's sons.

The case was tried before KIRKPATRICK, J.

The plaintiffs gave evidence that "the consideration of the transfer of the lease to Macy was: the North American Oil and Mining Company were indebted to the Macys for money paid and the mortgage spoken of, for interest due and unpaid, for insurance money advanced by them and unpaid to them by the North American Oil and Mining Company. These formed the consideration of the transfer of the lease to the Macys. They were to credit the money received under the lease on the mortgage and other advances."

They gave evidence that the coal rent due to Mrs. Denny for coal on the 1st of January, 1838, was \$1,026.74; that the defendants had paid no coal rent; also that the president of the defendants knew of the mortgage, of the interest in arrear, of unpaid taxes, insurance advances and Mrs. Denny's rent; the North American company had been frequently called on for taxes.

They gave in evidence the amounts in detail of interest due on the mortgage, of taxes, of insurance and Mrs. Denny's rent.

The defendants offered in evidence, as set-off, a number of notes due by the North American company to third persons amounting to about \$10,000, indorsed to the defendants,

with proof that they owned them before the commencement of the suit; some of them before the assignment of the lease to Macy. The offer was rejected and a bill of exceptions sealed.

They renewed the offer, with the additional offer that the North American company was insolvent at the trial, and when the suit was brought. This was rejected and a bill of exceptions sealed.

The plaintiffs submitted these points which were affirmed:

3. Under the covenant of the defendants to pay and discharge all arrears of interest due and owing on the mortgage, and all interest that shall accrue during the terms of the lease, they assumed the same liability which rested upon the North American Oil and Mining Company to Macy; that is to say, to pay within a reasonable time, or on demand, the arrears of interest and the accruing interest, according to the terms of the mortgage; and the defendants, having failed and neglected to pay, have violated their covenant, and plaintiffs are entitled to recover all interest due and unpaid at the commencement of this action.

5. Under the covenant to pay the taxes, it was defendants duty to pay within a reasonable time, and if the jury believe the evidence of Joseph Myers and others, defendants have violated their covenant in this respect, and plaintiffs are entitled to recover all taxes unpaid at the date of the lease of July 1, 1837, and all assessed since that date and prior to the bringing of this action.

6. The plaintiffs are entitled to recover the amount of the rent unpaid to Mrs. Denny at the bringing of this action, together with interest thereon.

The defendants submitted these points which were refused:

2. The payments to be made by defendants are in the nature of rent, and no time having been fixed for the payment thereof, there was nothing due from the lessee to the lessor before the expiration of at least one year of the term. Accordingly, this suit having been brought prior to that time, plaintiffs can not recover.

3. If the last point be declined, then the covenants by defendants, the breaches of which are declared on, were in the nature of agreements to indemnify the plaintiffs *pro tanto*.

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And the plaintiffs having given no evidence that they had been called on since the date of the lease to make payment, and there being no evidence or claim that they have paid the respective amounts against which they were thus indemnified, have failed to show special damages, and can not in this suit recover more than nominal damages for the breach of said covenants.

4. The equitable plaintiffs held the lease subject to all equities between the legal plaintiffs and defendants at the time of bringing this suit.

5. No sufficient authority has been shown for the execution of the lease in evidence, and the said lease as a deed was null and void. The only rights arising to the plaintiffs would be for the use and occupation of the premises by the defendants.

6. The board of directors of the North American Oil Company had no power or authority to make the lease upon which this suit is brought.

7. The plaintiffs can not in this suit recover more than nominal damages for breach of the covenants to pay the rent due Mrs. Denny or the interest due Macy.

The verdict was for the plaintiffs for \$9,202.61.

The defendants removed the case to the Supreme Court, and assigned for error:

1 and 2. The rejection of their offers of evidence.

3-8. The refusal of the defendants' points.

9-11. The affirmance of the plaintiffs' points.

H. BURGWIN, for plaintiffs in error.

E. S. GOLDEN and J. K. KERR, for the defendants in error.

The opinion of the court was delivered January 3, 1871, by SHARSWOOD, J.

The first and second errors assigned are to the rulings of the learned judge below in excluding the offer of the defendants to prove a set-off, consisting of promissory notes of the plaintiffs past due and originally drawn in favor of third persons, and by them indorsed to the defendants. Waiving the consideration of other objections made to the admission

of this evidence, we think that it was rightly rejected because clearly precluded by the terms of the lease sued upon. That a party may be debarred from availing himself of the act of assembly about defalcation, by an agreement not to plead it, either express or implied, has been adjudged by this court in *Henniss v. Page*, 3 Whart. 275; *Bank of U. S. v. Macalester*, 9 Barr, 475; *Reed v. Penrose*, 12 Casey, 214. So far as this question is concerned, the court in the case last cited may be stated to have been unanimous, for, although Mr. Justice Strong thought that the contract in that case did not, by implication, prevent the defendant garnishee from setting up his claims against the company as an answer to the attachment of another of their creditors laid upon the money in his hands, yet he admitted, in clear and distinct terms, the general principle as stated. "This right of defalcation," said he, "is a legal right, secured to a defendant in all cases where he holds demands against a plaintiff, due in the same right and due at the time when the suit was commenced against him. I agree that he may, by express contract, preclude himself from pleading a set-off. Such a contract, founded on consideration, would bind him. This I understand to be the principle of *Henniss v. Page*, 3 Whart. 275, and, I think, a defendant may also debar himself from using a set-off by a contract not express. Thus, if he receives money delivered to him for his application to a particular use, his receipt may amount to an agreement not to apply it to any other use, and, of course, not to his own, by pleading a set-off." The example thus stated of an agreement necessarily implied is in effect the very case now before us. The defendants bound themselves to apply the consideration they were to pay for the grant of the lease to a particular use, and they can not apply it to any other use, and of course, not to their own in payment of the promissory notes which they have bought up and hold. The covenant contained in the lease was that the consideration should be paid to certain creditors of the lessors who held incumbrances upon the leased premises. It was for the purpose of relieving it from these liens. Had a clause been added that it should not be applied to any other debts, it would not have been stronger by such express agreement than that which was thus necessarily implied. The covenant being under seal, the action could only be brought in the name of the covenantees, as was

held in *De Bollé v. The Penna. Ins. Co.*, 4 Whart. 68; yet it may be sued and recovered upon to the use of the parties to whom the money was to be paid, and the court will so control the execution upon the judgment as that it shall be eventually appropriated as agreed upon.

The 3d error assigned is to the refusal of the learned judge to charge as requested in the defendant's 2d point, that this suit had been prematurely brought, because the obligation to pay by the defendants did not accrue and become due until the expiration of the term granted by the lease. This proposition proceeds upon the idea that the payments stipulated to be made were in the nature of rent, and no time being expressly fixed were not payable until the land had been enjoyed. But it is very evident that the covenant to pay these debts was an immediate one, for they were then already due, and the very object of the stipulation was to save the property from being proceeded against, and thus lost to the lessors. The covenant was the consideration for the grant of the lease and not for the enjoyment of the property. When a lease is granted with a reservation of only a pepper-corn or nominal rent, or with no rent at all, the consideration may lawfully be, and usually is, a sum of money paid in cash. There is nothing to prevent it from being to be paid at a certain time in the future, or, as here, without any time, which is either that it shall be paid forthwith or in a reasonable time, it matters not which, so far as this case is concerned. It was not reserved as rent, and it is very plain that the parties did not so intend it.

The 4th, 8th, 9th, 10th and 11th assignments of error may be considered together. They are all grounded upon the position that the covenant sued upon was one of indemnity merely, and the plaintiffs not having shown that the incumbrances had been enforced against the property or that they had been compelled to pay them, they had suffered no actual damage, and therefore could recover at most but a nominal sum. The answer to this position is twofold. The covenant in its terms was a direct and absolute engagement to pay at once or within a reasonable time, and the lessees not having done so it was broken, and the covenantees as the legal plaintiffs could recover the whole amount to the use of the creditors to whom the amount had been specially appropriated by the agree-

ment. But even supposing it to be an indemnity merely, we must regard the lessees by their absolute engagement to pay as assuming the place of principals while the plaintiffs became sureties merely. Though as to the creditors the plaintiffs remained principals, as between them and the defendants they were sureties. Then it is well settled that as soon as the surety's obligation to pay becomes absolute he is entitled in equity to require the principal debtor to exonerate him, and he may at once file a bill to compel an exoneration, although the creditor has not demanded payment from him: *Beaver v. Beaver*, 11 Harris, 167. Equity is part of the law of Pennsylvania, and is administered through common-law forms; for the greater period of her history could only be so administered. The vesting of separate equity jurisdiction in the courts has not changed the law in this respect. Hence on a bond or covenant to indemnify against claims the obligee is entitled to sue as soon as a claim is made and need not wait until judgment is recovered against him or even until an action is commenced: *Miller v. Howry*, 3 P. & W. 374; *Bank v. Douglass*, 4 Watts, 95; *Stroh v. Kimmel*, 8 Watts, 157; *Leber v. Kauffelt*, 5 W. & S. 440; *Carman v. Noble*, 9 Barr, 366.

The 5th assignment of error complains of the refusal of the court to affirm the defendants' 4th point, which was "that the equitable plaintiffs held the lease subject to all equities between the legal plaintiffs and defendants at the time of bringing this suit." In the abstract this proposition was certainly true, but it was entirely irrelevant to any question before the jury. No evidence had been given of any equities, unless the defendants considered their alleged set-off to be such, and that as we have seen was no equity at all; for the defendants had precluded themselves by their own agreement from setting it up against the legal plaintiffs.

The remaining errors complained of in the sixth and seventh assignments may be considered together; namely, that the directors of the corporation, plaintiffs, had no power to make the lease sued on. It is supposed that a company chartered for the purpose of manufacturing and refining oil can not lease its entire property and so defeat the very purpose for which its charter was granted. But corporations, unless expressly restrained by the act which establishes them, or some other act of assembly, have and always have had an

unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property. Hence an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter: *Dana v. The Bank of the United States*, 5 W. & S. 223. If they can alienate absolutely, they may lease, which is but a partial or temporary alienation. *Omne majus continet in se minus*.

Judgment affirmed.

BARKER V. DALE ET AL.

(3 Pittsburg, 190. U. S. Circuit Court, Western District of Pennsylvania, 1870.)

¹ **Ejectment—Oil lease.** A lease of land “for the sole and only purpose of mining and excavating for petroleum, coal, rock and carbon oil, or other valuable mineral or volatile substances,” vests a corporeal interest for which ejectment will lie.

² **Time—Breach of covenant without forfeiture.** A clause in an oil lease to commence operations by a day certain, is of the essence of the covenant, so far as to give an action for damages after the expiration of the lease; but it is not a condition the breach of which forfeits the lease.

Lessor excluded from mining. A mining lease for a term certain, saving only to the lessor the right of tillage, is exclusive, and the lessor can not mine himself within the tenement.

³ **A lessee may abandon** and after the abandonment he can not recover the premises.

On the 8th day of December, 1865, Alanson Clark leased to the plaintiff, Barker, the land in dispute, by written lease, “for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, or other valuable mineral or volatile substances,” * * * “to have and to hold the said premises for the said purposes only, unto the said Barker, his heirs, executors, administrators and assigns, for twenty-five years,” for which Barker was to deliver to Clark “one half the oil, etc., found.” The said Barker “to commence

¹ *Chicago Oil Co. v. U. S. Co.*, 57 Pa. St. 83. *Post* RECEIVER.

² *Bell v. Truit*, 8 M. R. 649.

³ 1 M. R. 67, note 13.

operations by the first of April, 1866." The lessor warranted the title.

Barker never took possession of or commenced to work on the land under the lease.

Some time after this Clark leased one acre of the said land to Dale, the defendant, who obtained a large producing well—upon learning which, Barker brought this suit in ejectment for the land. These facts were in substance conceded. The defendant asked the court to charge the jury in answer to the five following points.

C. B. CURTIS, for plaintiff.

GEO. H. CUTLER, for defendants.

McKENNAN, Cir. J., answered the points as follows:

1st. The right acquired by plaintiff under the agreement of December 8, 1868, in the premises therein described, was an incorporeal right only, and upon such right ejectment will not lie, and therefore the plaintiff can not recover.

Answer by the court. The first prayer is refused. We are of the opinion that by the lease, dated December 8, 1865, a corporeal interest in the business therein described was vested in the plaintiff, which is the proper subject of an action of ejectment.

2d. That the clause in the agreement that the plaintiff was to commence operations by the first day of April, 1866, is a condition subsequent, and his failure to perform this condition determined his right under the agreement, and hence he can not recover.

Answer by the court. This prayer is also refused. The clause by which the plaintiff was to commence operations by the first day of April, 1866, is not a condition, the non-performance of which determined the plaintiff's rights or worked a forfeiture of his interest under the lease.

3d. The time mentioned in the agreement within which the plaintiff was to commence operations was of the essence of the contract, and the plaintiff not having commenced operations within that time, he can not recover.

Answer by the court. The time fixed in the lease within which the plaintiff was to commence operations is of the es-

sence of the contract, so far as to enable the lessor, after its expiration, to maintain an action against the plaintiff for the non-performance of his stipulation, but not so as to divest his interest under the lease.

4th. The agreement in question did not give the plaintiff any exclusive right of mining and excavating for petroleum on said premises, and hence the plaintiff can not recover.

Answer by the court. This prayer is refused. The lease grants to the plaintiff for a determinate term, the premises in dispute, for the purposes therein stated, subject to lessor's "use of the same for the purpose of tillage," and this is exclusive of any right of the lessor to mine or excavate within their defined limits, for petroleum, coal, rock oil, carbon oil, or other mineral or volatile substances.

5th. If the jury believe from the evidence that prior to the lease of September 14, 1868, to West and another, the plaintiff had abandoned all his rights under the agreement, and all intention of mining or excavating for oil, etc., on the premises therein described, then he can not recover.

Answer by the court. This prayer is allowed. The jury must be satisfied by the evidence that the plaintiff intended to surrender his lease and to abandon altogether the commencement or prosecution of mining or excavating operations, and that his acts touching such alleged abandonment were perpetrated with such intention.

The jury, after a few minutes consultation, returned a verdict for the plaintiff, with nominal damages and costs.

CLARK V. BABCOCK.

(23 Michigan, 164. Supreme Court, 1871.)

Lessor not bound to repair. A lessor is under no general obligation to put premises in repair, and his covenants to do so are not to be enlarged beyond their fair intent.

Lessee's option to perform lessor's covenants and charge against the rent. A lease of a sawmill and salt works to be run in connection with it was made on February 16th for a year from February 1st. The lessor was made liable to a deduction of rent for delays caused by

breakage, etc., and the lease was made on the basis that the mining year began May 15th and continued only six months. It required the lessor, by a date certain, to put the premises in repair, in default of which lessee was authorized to make the necessary repairs and charge them against rents. Sufficient time was allowed him to make such repairs between the date limited to the lessor and the commencement of the season: *Held*, that the lease did not authorize the lessee to claim damages for the lessor's delay or neglect to repair, the lease providing its own remedy in such case.

¹ **No covenant for capacity.** The lease of a salt well implies no covenant that the well shall be of any particular productive capacity. In the absence of any distinct agreement the lessee takes it as he finds it.

No judicial knowledge assumed on matters of expert testimony.

Where the lessor was charged with having, by improper measures in the repairs he was bound to make, rendered the salt well less productive than it would have been otherwise, and the court held he would be responsible therefor if guilty, but the testimony of all the witnesses informed on the subject was in his favor, and the question was properly left to the jury as a question of fact: *Held*, that the court could not assume a judicial knowledge on the subject of the proper method of boring and tubing salt wells which would justify it in holding the instruction erroneous as matter of law and declaring the lessor to be in fault. Such questions are matters of fact and courts are not bound to have, and this court does not assume to have, any judicial knowledge on the subject.

Error to Bay Circuit.

The nature of the case and the facts are sufficiently stated in the opinion.

MARSTON & HATCH, for plaintiff in error.

GRIER & McDONELL, and C. I. WALKER, for defendant in error.

CAMPBELL, Ch. J.

Babcock sued Clark as his lessee for rent. The defense set up by way of recoupment was under a claim for damages, partly for delay in getting the property in condition for profitable use, and partly for expenses in repairs.

The lease dated February 16, 1869, but covering a term of one year from February 1, 1869, demised a "steam sawmill and salt works," and the lands thereunto belonging and apper-

¹ *Harlan v. I chigh Co.*, 8 M. R. 496.

taining, described in full, with a reservation of certain houses and premises not used for business. Upon notice to be given on or before October 1, 1869 (which was actually given), the lease was to be extended two years more, but subject to be defeated by the lessor on notice and payment of certain sums named. The lease was renewed without countermand. The rent was \$10,000 a year, \$1,000 to be paid to the lessor for repairs to be made by him, \$1,000 for insurance, and the balance as specifically provided. The clause which has led to this controversy is as follows:

"It is also mutually agreed that said party of the first part shall, at his own expense, put the salt works on said premises in complete running order on the 15th day of March next, and shall, at his own expense, put the mill on said premises in complete and good running order on the 15th day of April next. In case said mill and salt works are not put in order as above, at the times above specified, then and in such case said party of the second part shall have the right and privilege of completing the same at the expense of the first party, and deduct the same from the first payments."

Provision was further made that if the lessee should employ one Bunnell, as engineer, all damages from breakages and explosions, and all damages caused by Bunnell's carelessness, should be at the lessor's risk, and the lessee should have the privilege of repairing the damages and deducting the expense from the rent, and should have a *pro rata* deduction from the rent for any time the mill should thereby be kept idle; and for the purpose of this *pro rata* deduction it was declared that "the year shall be called the sawing season, viz., six months, commencing on the 15th day of May, and ending on the 15th day of November, and shall be the *pro rata* of said sum of ten thousand dollars."

The lease further provided that a total destruction of the mill by fire should terminate the lease, and that in case of a partial destruction of the mill, the lessee might repair at the lessor's expense, deducting the cost from the rent, and during the repairs the entire rent should cease, running on the same *pro rata* as in the case before provided. Possession was to be given and taken at once. The lessor failed to complete the salt work repairs by the 15th of March, or the mill by the

15th of April, and the lessee after each of those days respectively assumed and completed the repairs. The salt works were put in complete running order by the 10th of April, but the supply of brine being unsatisfactory, further work was done from time to time on the well, extending into August. The mill was put in complete condition on the 11th of May.

The court below excluded all evidence of damages dependent on the preliminary delay in getting the property in running condition, and confined them (beyond the expenditures for repairs) to such as might arise out of the deficiency in the well, to be noticed hereafter.

The ground of this exclusion was that the lease did not contemplate any redress for such preliminary failure, beyond the right of the lessee to step in after March 15th and April 15th respectively, and complete the work at the lessor's expense to be applied as rent.

Upon a careful review of the lease we think this holding was proper. It appears distinctly from subsequent clauses that the parties had their attention called to, and made positive and full provision for, delays arising out of matters which the lessor agreed to be responsible for, by deductions from the rent for repairs to be made at his expense, the lessee being allowed to expend the money. And in those cases interruptions in the use of the property were to be allowed for by corresponding stoppages of rent, the six month's busy period being considered as the only period for which rent was to be computed. This being so, and delays in the outset being also expressly provided for, and the repairs being also provided for, in such case to be made by the lessee and paid out of the rent, the absence of any further remedy to compensate for the delay is very significant, and requires the remainder of the lease to be scrutinized, to see whether it can be regarded as an unimportant omission, having no legal bearing on the case.

The omission to provide any measure of damages, if it was really intended that a claim should exist, is singular, because the delay had been provided for in the other cases, by a sum certain, and not left to unliquidated damages, which in a case like this might be difficult of ascertainment, while a delay in advance would not be any more likely to be troublesome than one breaking in upon an established business. But it is also

to be noted that as the lease was only for one year, the six months sawing season applied to 1869, and would not begin until May 15th. The lease being dated February 16th, allowed one month for repairs on the salt works and one month further for the mill; and in case either work was not done at that time, allowed the lessee to do it himself. The times which would elapse between the dates when he was to be at liberty to begin, and the commencement of the sawing season, corresponded with those originally allowed to the lessor, exceeding them by a day or two, or the difference between February and March. The parties must be supposed to have estimated how long it would take to execute any necessary repairs, and to have allowed the lessor all needful time for them. And as the time thereafter remaining for the lessee to complete them would be quite as long, it is plain that it was not imagined any loss could probably accrue from the delay, as one party could proceed as diligently as another. There is nothing then, in the nature of the case, to render such a consequence unreasonable or unfair.

The subsequent facts could not have any bearing on this question, unless possibly the extent of repairs needed might have been concealed. But the case shows that all the work needed to do what was contemplated was actually done by the lessee in a shorter time than was allowed to the lessor, and was completed before the season for work began. There is nothing in the case, then, to indicate any hardship or variance from the natural inference derivable from the papers themselves.

It is also to be remembered that the lessor, under such a lease, would have been under no obligation to repair without an express agreement to do so; and where such an agreement is coupled with a specific consequence in case of failure, this of itself has some slight tendency, without some reason to the contrary, to favor the idea that no other remedy was contemplated. Such rules of construction, however, are not of much service, standing alone. But the fact that very careful and specific provision is made for later delays, is quite important, and with the other provisions referred to, fully sustains the ruling below.

It is true the salt works are not mentioned in the subse-

quent provisions for faulty delays. But this is explained by the fact that the lessee was expressly required to make all but the original repairs at his own expense, except in the specified cases of loss in the mill by fire, and by misconduct of Bunnell, and breakages in the mill. There was no anticipated case that could arise of injury to the salt works, where the lessor would be responsible for accidents. It is also noteworthy that the lease was to terminate entirely as to the salt works, though uninjured, whenever the mill was destroyed, and rent to cease for the entire premises, salt works and all, when the lessee was repairing the mill in the excepted cases. The mill was evidently the principal, and the salt works an incident, however valuable they may have been. There was no error in the refusal to allow damages for the first delay.

The other grounds of error relate to the condition of the salt well, and the losses supposed to have accrued by reason of its defects. The claim is two-fold—first, that the lessor was bound to furnish a well capable of supplying sufficient water in quality and quantity for the profitable use of the works; and second, that he is liable for having actually rendered the well less productive than it would have been without his work.

We think there is nothing in the first suggestion. The lease was a lease of an existing property, which was merely to be put in order. No covenant can be implied that the well would be of any especial capacity. Such as it actually was, the parties leased it, and there is no possible foundation for any claim for losses from failure, unless it was injured by the lessor. The second question is the only one needing attention. To understand this it is necessary to look at what was done.

The well was originally sunk by the lessee during some former occupancy. It had never been used but had once been pumped about twelve hours, with satisfactory results. The lessor, in repairing it, provided for rimming it out and tubing it down deeper than the first tubing had gone. This work was assumed by the lessee and continued for nearly a month after the lessor's time had run out, and it does not appear distinctly who was responsible for the deep tubing, but seems to be assumed, and we shall here take it for granted, correctly,

that the lessor having made the plan contemplated it. There were three successions of salt rock. The upper one seems to have been unavailable, as containing gypsum. The second and third were free from it. The tubing as continued down passed the second rock and the supply was mainly or entirely drawn from the third. The testimony shows, without contradiction, that when the tubing was put down to the third rock, everything was in good order and the well yielded all it would yield from that point; but that yield was claimed to be less than it would have been if the lessor had not rimmed out the well as he did; and this is the injury complained of. The evidence showed, without contradiction, that there was no lack of skill or care in the lessor or his employees. The evidence tended to prove, and there was none to the contrary, that the gypsum could only be excluded by tubing below the first salt rock, and that the lessee, after taking possession, experimented with the well and caused the tubing to be raised; but the supply of strength of the brine was in no manner increased, nor was the well in any manner benefited thereby, and the supply was then apparently all from the third salt rock. All the experts swore, and there was no evidence to the contrary, that rimming out the well in question, as was done by the plaintiff, could in no manner injure the well or its value, but from the fact that it increased the surface of the well it would increase the flow of the brine, and that sinking the tube down to the lower rock could not decrease the quantity of brine except while the tubing was so sunk. The court further certified that the only evidence tending to show the cause of the deficiency of the well was that it was probably affected by an adjacent well.

Taking these matters together it appears from the judge's statement that there was no testimony whatever from which the lessor could be found to have in any way been responsible for any supposed damages to the well. But counsel claimed there were some facts in the case which might be made to bear that tendency, provided this court would take, as he claimed they should take, judicial notice of the means used in the construction of salt wells to make the tubing serve its proper purposes, and to shut out the detrimental matters that would otherwise injure the work. We can not, however,

assert any such knowledge, even if we possessed it. The whole inquiry is eminently one of fact, requiring a peculiar and scientific or practical knowledge, the result chiefly of local experience. No court can safely venture to propound theories in such cases, and the views of experienced men, who are examined before the jury as to facts as well as deductions from them, are necessary to arrive at the truth. When their testimony is uniform—and the circuit judge says it was here—there would be manifest impropriety in our assuming that they were mistaken. And while the court below, properly assuming that it was for the jury to confide in them or not, left some questions of damage to be passed upon, yet after verdict, when he certifies to such entire uniformity of proof, no error could be maintained which required that proof to be disregarded.

But we do not conceive that even in this point of view the charge especially complained of could have misled the jury. A juror having asked whether the defendant had “the privilege of improving the salt works, allowing that the plaintiff had failed to put them in order—would the plaintiff be liable?” The court replied: “If the jury are satisfied that when the defendant took possession the well was simply not put in good running order, Mr. Clark had the privilege and it was his duty to put the well in repair. That is his remedy, furnished by the lease, to put it in repair; but if plaintiff had, by what he had done to it, rendered it incapable of being put in good running order, then it was not necessary that Mr. Clark should expend his money upon it.” This was equivalent to saying that if the well was capable of being put in order, the lessee was at liberty to repair it, and should do so under the lease, and deduct the repairs from the rent, while he was not bound to throw away money on a well that had been made useless. A previous part of the charge had stated very explicitly the liability of the lessor to respond for any such injury, as a distinct grievance and a violation of the conditions of his lease. The juror’s question seems to have been suggested by a portion of the charge which had declared such an injury would have been a failure to put in order, and the answer explained very well the different circumstances under which the lessee would or would not be compelled to

expend money as a condition of recovery of damages or reduction of rents.

We think the judgment should be affirmed with costs.

COOLEY and GRAVES, JJ., concurred.

CHRISTIANCY, J., did not sit in this case.

MASSOT V. MOSES.

(3 South Carolina, 168; 16 Amer. R. 697. Supreme Court, 1871.)

¹ **Lease distinguished from license—Divisibility of leasehold interest.**

The owner of a tract of phosphate land, for the consideration of \$2,000, granted to defendant "the right and privilege of entering in or upon, by himself or his agents, all or any part of the land, for the purpose of searching for mineral and fossil substances, conducting mining operations to any extent," and to use and appropriate all minerals that might be found "by any person or persons, or contained in" the tract, for the term of ten years: *Held* a grant of the phosphate beds, with the exclusive right to work them for the term, and not a mere license, and that the grantee had the right to divide his interest and convey part of it to others.

Controlling clause. The expression "that may be found by any person or persons or contained in any part" of the land, distinguishes this from *Lord Mountjoy's case* and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed and intended as compensation for the right granted.

Cases cited. The principal cases on the distinction between grants, leases and licenses to mine reviewed, and the principles deducible from them stated.

² **Mining conveyances deal with the cube.** Conveyancing usually deals with surface lines, but the land, which is a man's possession, "is a solid body of rock, soil and water, bounded by planes instead of lines." A horizontal plane can be made a dividing line, and unopened beds may be granted the same as the surface, without thought of livery of seizin.

A grant for a term of years of the exclusive right to take phosphate is a demise of the phosphate beds contained in the land.

Bill in equity by Horace Massot, plaintiff, against O. A. Moses, W. L. Bradley and C. C. Coe, defendants.

¹ *Sobey v. Thomas*, 4 M. R. 360.

² *Richmond Co. v. Eureka Co.*, 9 M. R. —.

The bill alleged that on the 24th April, 1838, the plaintiff was seized in fee of a plantation in Charleston county, containing one hundred and thirteen acres of land, in, upon or under which there were certain veins or beds of phosphate rock of great value; that on the day and year mentioned, the plaintiff entered into an agreement with the defendant, Moses, whereby, in consideration of the sum of \$2,000, he granted, sold and conveyed unto the said Moses, "his heirs, executors and assigns, the right and privilege of entering, by himself and his agents, in and upon all or any part of the said tract of land, for the purpose of searching for minerals and fossil substances and conducting mining operations, to any extent the said Moses might deem advisable, and for working; removing, selling, using and appropriating as the property of the said Moses, for the term of ten years, all organic or inorganic minerals, rocks, fossils, marls or so-called phosphates that might be found on, by any person or persons, or contained in, any part of said plantation," which said privilege was, however, subject to the proviso. "that the said O. A. Moses should not, at any one time during the aforesaid term of ten years, engage in working over one third part of the said tract. The third to be so worked to be selected by the said O. A. Moses, and such selection to be made as often as the said O. A. Moses might desire."

That immediately after the execution of the said agreement, the defendant, Moses, entered upon the said land, and commenced mining for phosphates thereon, and has continued to do so to the present time, and has erected offices, houses and other buildings on said land; that in November or December, 1869, he, the said Moses, granted to the defendants, Bradley and Coe, the right to dig and mine for a long term of years, upon so much of the said plantation as lies to the west of the Northeastern Railroad track, and bound them to pay him one dollar per ton for all phosphates dug by them, and to dig not less than 5,000 tons per annum; that the said Bradley and Coe have entered upon said plantation under their said agreement with Moses, and are prosecuting mining operations thereon, and have dug therefrom large quantities of phosphates and sold the same; that the said Moses is about to open fresh mines upon that part of the said tract lying

to the east of the Northeastern Railroad track, and work the same for his own benefit. The bill charged that the assignment by Moses to Bradley and Coe was illegal, and a fraud upon the plaintiff, and extinguished all his right and interest in said tract of land, and that the plaintiff was entitled to an account of all the phosphates dug by the defendants on said tract, and the profits and produce thereof; and it prayed that an account be taken of all such phosphates, and of the proceeds of the sales thereof, and that the defendants be enjoined from working the mines in said land.

The defendant Moses filed an answer and demurrer, and the defendants Bradley and Coe an answer and plea to the bill.

On July 1, 1870, an order, by consent, was made, appointing I. W. Hayne, Esq., referee in the cause, and referring it to him to hear and determine all the issues therein; and on the 26th day of the same month and year he made his report, which was excepted to by both parties.

DINGLE, PRESSLY, LORD and INGLESBY, for plaintiff, contended:

I. That the deed of 24th April, 1868, granted to Moses the right to dig on the premises described therein for phosphates, but conferred no property or estate in the phosphates themselves until severed from the soil. It was a sale, therefore, of such phosphates only as were raised during the term, and conveyed to Moses an incorporeal and not a corporeal hereditament: *Collier on Mines*, 4 Law Lib., 6th series, 1, 15, 111; *Bainbridge on Mines*, 156, 710, 733, 800; *Bac. Abr. Leases*, K; *Doe v. Wood*, 2 Barn. & Ald. 731; *Chetham v. Williamson*, 4 East, 469; *Norway v. Rowe*, 19 Ves. 158; *Grubb v. Bayard*, 2 Wall. Jr., 81; *Funk v. Haldeman*, 53 Penn. 229. The deed, therefore, was not a lease, but a license.

II. That the license conferred upon Moses was not exclusive of the plaintiff's right to dig for and take phosphates from the premises: *Collier*, 9; *Bainbridge*, 308; *Lord Mountjoy's Case*; *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Penn. 241; *Gloninger v. Franklin Coal Co.*, 55 Id. 9; *Clark v. Way*, 11 Rich. 624; 2 Bl. Com. 20; *Smith on Real Prop.* 4;

Caldwell v. Fulton, 31 Penn. 475; *Clement v. Youngman*, 40 Id. 341. and cases cited on first point.

III. It is contended that the grant to Moses, though a license, was irrevocable and assignable, but we insist that the contract between Moses and Bradley and Coe was not an assignment of an existing interest, but the creation of a new interest; a license from Moses to Bradley and Coe: *Tayl., L. and T.*, §§ 426, 429, 431.

IV. That the incorporeal hereditament granted to Moses, though assignable, was indivisible, and by attempting to sever it Moses has destroyed it. See cases cited above, and *Leyman v. Abeel*, 16 Johns. 80; *Van Rensselaer v. Radcliff*, 10 Wend. 639.

Cases were also cited upon the plaintiff's second and third grounds of appeal, which are not given, as those grounds were not considered by the court.

Buist, for defendant Moses.—The deed of 24th April, 1868, is substantially a lease for ten years of the minerals in the land. It is a grant of a corporeal right and can not be properly construed to be the grant of a mere license or incorporeal hereditament: *Crabbe's Dig., Real Property*, § 1281; *Jackson v. Harsen*, 7 Cow. 326; *Jackson v. Kisselbrack*, 10 Johns. 336; *Shep. Touchstone*, 86; 3 *Bac. Abr.* 363; *Moore v. Fletcher*, 16 Me. 63; *Crosby v. Bradley*, 20 Id. 61; *Bac. Abr., Leases K*; 2 *Washb. on Real Prop.* 345; 1 *Id.* 12, 270; *Stewart v. Garnett*, 3 *Sim.* 398; *Legard v. Hodges*, 3 *Bro. Ch.* 441; *Co. Litt.* 46; *Parker v. Plummer*, *Cro. Eliz.* 190; *Queen v. Winter*, 2 *Salk.* 588; *Paramour v. Yardley*, *Plow.* 539; *Throckmerton v. Tracy*, *Id.* 145; *Col. on Mines*, 5; *Stoughton v. Leigh*, 1 *Tannt.* 403; *Adam v. Briggs Iron Co.*, 7 *Cush.* 361; *Yale on Min. Claims and Wat. Rights*, 215; *Cary v. Daniels*, 5 *Metc.* 236; *Seaman v. Vandrey*, 16 *Ves.* 390; 1 *W. Bl.* 482; *Muskett v. Hill*, 5 *Bing. N. C.* 694; *New Jersey Zinc Co. v. New Jersey Frank. Co.*, 13 *N. J. Eq.* 322; *U. S. v. Gratiot*, 14 *Pet.* 526. He also cited the Pennsylvania cases cited on the other side at great length.

Moses had the right to divide his interest and assign part of it to others: 2 *Story's Eq.*, §§ 1039, 1040; 12 *Peters, Tit. Leases*; 2 *Story's Eq.* §§ 1050, 1051. He also cited *Ricketts v. Bennett*, 4 *Com. B.* 686; *Dickinson v. Vulpy*, 10 *B. & C.* 128; *Hawtayne v. Bourne*, 7 *M. & W.* 595.

MEMMINGER and CORBIN, for defendants.

WILLARD, J.

In the decision below and in the argument at the bar, an important feature of this case has not received the attention due to the importance of its bearing. The line of argument pursued assumes that the question whether the defendant Moses acquired under the grant of Massot an exclusive right as against the grantor, to the minerals contained within the premises described for the period of ten years, is to be decided by first determining whether the thing granted was in its nature corporeal or incorporeal. It is contended that the grant created at most either a mere license or an incorporeal hereditament, and authorities are cited to show that in such cases the grant does not include the right of the grantor to exercise, concurrently, a similar right to that conferred by his grant or license. The objection to this line of argument is that it lays too great stress on the technical import of the words of conveyance and gives too little attention to the actual intent of the parties as evinced by the entire instrument. The true inquiry is, what, from the construction of the whole instrument, was the nature of the right, power or property intended by the parties to be vested in the grantee? Having ascertained from this source the nature of the thing granted, it will not be difficult to ascertain whether it is corporeal or incorporeal, nor to find the technical terms appropriate to describe such intent. The instrument in question is, in form, a deed signed, sealed and witnessed as such. Massot, in consideration of \$2,000, grants, sells and conveys to Moses, his heirs, executors, administrators and assigns, "the right and privilege of entering in and upon, by himself or his agents, all or any part of the land hereinafter described, for the purpose of searching for mineral and fossil substances, conducting mining operations to any extent the said party of the second part may deem advisable, and for working, removing, selling, and, as the property of the party of the second part, to use and appropriate for the term of ten years from the date of these presents all organic or inorganic minerals, rocks, fossils, marl, or so-called phos-

phates that may be found on, by any person or persons, or contained in any part of all that plantation or tract of land," etc. Moses is further to have the right to cut and remove trees, wood and timber, when he shall deem it advisable and advantageous; such trees, wood and timber to remain the property of Massot, who is to have the disposal and profit thereof.

The deed contains the following proviso: "Provided, further, that the party of the second part (Moses) shall not, at any one time during the aforesaid term of ten years, engage in working over one third part of the said tract, the third to be worked to be selected by the party of the second part, and said selection to be made as often as the party of the second part may desire." The deed further conveys, for the like period, a general right of way, with the privilege of constructing railroads and other roads, and machinery to be used in the extraction, preparation, manufacture and transportation of the organic and inorganic substances in question, with the right to remove the same at the expiration of the term aforesaid. What distinguishes this grant from that in *Lord Mountjoy's Case*, Co. Litt. 165, and in all the other cases relied on as decisive against the exclusive nature of the grant, is contained in the expression "that may be found on, by any person or persons, or contained in any part," etc. The term "any person" must be regarded as including the grantor, so that if the grantor, in an attempt to exercise the same right as that conferred, should find any such substances upon the premises described, such act of finding would complete the title of the grantee or his assigns to the substances so found under the express terms of the grant. It might, perhaps, be said that this applies only to substances "found on," but not those "contained in" the premises. The construction can not prevail, for it would contravene the general intent of the instrument. It is clear that, as to some part of the minerals, the right of the grantor is excluded, and to that extent something more than a right in the nature of common is conveyed. How far, then, does this exclusion extend? It is evident that the parties did not intend to make a distinction, as to the character of the grantee's title, between the minerals lying on the surface of the ground and those contained within it. Such

a distinction would be inconvenient and senseless. If, then, it was intended that the grantee should have the same right in respect to the one class as to the other, the particular expression under consideration must be regarded as characterizing the grantee's right, as to the whole, as exclusive of the grantor, and all other persons.

This view is aided by the fact that the consideration of the deed was an entire sum of money, demandable absolutely under the deed, and which may be assumed to include a valuation, fixed by the parties, on all minerals that the grantee was authorized to remove from the premises, and might, by possibility, remove therefrom during the term of ten years, and by the further fact that the deed, by its terms, professed to sell and convey the material itself, as well as the right to search for and take it.

It is not necessary to rest this case upon the whole ground taken in *Caldwell v. Fulton*, 31 Penn. 475. In that case the grant was held to exclude the grantor on the ground that the consideration, being an entire sum, paid for the right conferred, evidenced an intent to sell the whole mineral content as such. Independent of the character of the consideration, the language of the grant in *Caldwell v. Fulton*, was substantially the same as that in *Lord Mountjoy's Case*. The opinion in *Caldwell v. Fulton* does not seek to unsettle the authority of *Lord Mountjoy's Case*, but finds grounds of distinguishing the cases in the fact that different inferences are to be drawn, as to the intended exclusiveness of the grant, from the respective considerations in the two grants.

In the case before this court, the construction of the grant does not depend wholly on the character of the consideration, as we have already seen. It is, however, a circumstance in the case, and therefore it is in place to inquire whether the fact that the consideration is an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted, tends to show an intent to convey an exclusive interest.

Apart from the limitation of ten years, if the subject-matter of the grant had been personal property instead of land, it would have passed an exclusive right of property to the grantee.

A bill of sale, for a valuable consideration paid, of all the goods of a certain kind in a certain warehouse, or all the quarried stone or mined ores in a certain field, would show an intent to transfer a perfect title. Should the vendor, at the same time, confer a license upon the purchaser to enter upon his premises, and to search for and remove the property, its effect would be to enlarge still further the right of the purchaser.

Although the subject-matter of the contract be land, still, if capable of severance, so as to become personal property, the parties are not precluded by any rule of law from treating it, in its unsevered condition, as personalty, and transferring title accordingly: *Clark v. Way*, 11 Rich. 624.

These propositions are not disputed by *Lord Mountjoy's Case*, nor by any of the English or American cases following its authority, but, on the other hand, are supported by many cases of undoubted authority.

To all such contracts and grants, whether relating to realty or personalty, the test that has been applied is the intent of the parties. The difference between the two cases is this: that certain words sufficient to manifest such intent, in the case of personalty, are not deemed sufficient for that purpose in the case of realty. The proper conclusion from these cases would seem to be that grants of a right to enter the lands of the grantor and sever therefrom and appropriate its products or mineral contents, are subject to a presumption not applicable to the case of a sale of personalty; that the grantor did not intend to exclude his own proprietary right to a concurrent enjoyment with the licensee of the power granted. If this view is correct, any words evidencing an intent on the part of the grantor to part with his proprietary rights over the subject-matter to which the grant relates, would rebut such presumption. What force, then, should be given to words tending to evidence an intent on the part of the grantor to exclude himself from the enjoyment concurrently with the grantee of the right conferred? So far as the existence of such a presumption bears on the question, the obvious answer is that the same force should be given to the expressions employed that would be given had the subject-matter been other than realty. The presumption, indeed, demands some

positive evidence of an exclusive intent, but does not influence the force of the evidence of such intent.

If the foregoing propositions flow from the principles of law, and are compatible with the adjudicated cases, then we have a clear rule to govern us in seeking the construction of the grant in question. We have only to ask what the parties had in contemplation as the right intended to be created, giving to the terms or expressions employed by them in a technical sense that technical force and effect conferred upon them by the adjudicated cases entitled to have weight as authority. We have now to look into the current of decisions to verify the grounds of our conclusions; but that we may the better understand their bearing and force, it is proper to observe some of the features in the various instruments which have received judicial construction as bearing on the question of intent.

In all the grants of mining rights, from the earliest reported cases down to the present time, there is a striking similarity in the terms used to describe the character of the rights intended to be conferred. It is described, substantially, as a right to enter certain designated premises, and to search for minerals, to mine or work them, appropriate and sell them. In some cases the premises may be used for manufacture only to the extent of preparing the raw material for use or sale; in other cases, like the case in hand, the right to use the premises for the purpose of manufacture is unlimited as to the nature and extent of the manufacturing powers. The right uniformly embraces authority to go upon the land of another, and perform there certain acts which could only be justified under authority, derived from the owner, of severing from the land certain portions of the body of the land so as to become personal property, and appropriating the same as against the right of the owner, and all other persons.

Such a right may exist perfect in the hands of a grantee, and yet not exclude the right of the grantor or owner to take from the land like substances for his own use, so that he does not obstruct or impede such operations as the grantee may have set on foot in virtue of his grant.

Although the right to mine in the lands of the grantor may extend to all minerals, or to all of a given class, yet that does

not exclude the grantor from appropriating minerals of that description, provided he does not obstruct the operations of the grantee. In a word, the possession of a right to go upon the lands of another to search for, sever, remove and appropriate any or all minerals, or any or all of a given class, does not exclude the owner of the land from taking to his own use minerals of the same character and class from the premises embraced in the grant. Nor does the fact that such right is, by the terms of the grant, an assignable interest in the hands of such grantee, operate to the exclusion of the grantor.

When, however, the grant evidences an intent to exclude the grantor, such intent provides whether the grant extends to all mineral substances, or to all of one or more classes. There are three modes in which the intent to exclude the grantor has been expressed: first, by terms importing a sale and conveyance of minerals, as such, in which case the grantor's right is excluded by a necessary implication from the possession of full proprietary right on the part of the grantee; second, by words of conveyance, conferring on the grantee exclusive power over the subject-matter of the grant; and third, by provisions excluding the grantor from the performance of acts appropriate to him as owner of the land, where the effect of such exclusion is to leave unlimited control in the grantee of all materials to which the mining right relates.

An intent to exclude the grantor, though not expressed in the body of the deed, may be implied from the nature of the consideration. The fact that the grantee is bound to pay for the substances appropriated by him according to the quantity realized, at an agreed rate, whether in kind or in money, does not, of itself, disclose an intent to exclude the grantor. But if the consideration appears to include a value fixed by the parties on the whole mineral deposit, and is demandable absolutely under the contract, without depending on the value of the actual result, from the mining operations of the grantee, the grant is regarded as a sale of the mineral, and, as to it, the grantor is excluded.

We will now look into the cases, in order to verify the deductions from them already stated.

Lord Mountjoy's Case, Co. Litt. 165, determines that a reservation of the right to take minerals and turf, although ex-

isting as an assignable and heritable interest, does not necessarily exclude the owner of the land. In that case, there were no words expressive of an intent to exclude the owner of the land, independent of the nature of the thing reserved. It is true the reservation must be regarded as made upon consideration, but the consideration, whatever it may have been, was not in a form enabling the court to conclude that, in fixing that consideration, the parties had acted upon a real or assumed valuation of all the materials subject to appropriation under the terms of the reservation.

The authority of this case has been recognized in this State, in *Clark v. Way*, 11 Rich. 624; in Pennsylvania, in *Caldwell v. Fulton*, 31 Penn. 624, and *Funk v. Haldeman*, 53 Id. 229. *Wilson v. McKreth*, 3 Burr. 1824, holds that one may have, as against the owner of the land, an exclusive right to take the turf. It is worthy of notice that, from all that appears in that case, the right of the plaintiff may have been limited to so much as he should require for a particular use. The question of exclusiveness was not treated in that case as at all dependent on the question, whether, in its nature, the right conferred was corporeal or incorporeal, but wholly on the terms of the grant or prescription under which it was claimed.

Chetham v. Williamson, 4 East, 469, followed *Lord Mountjoy's Case*. Lord Ellenborough says, in that case, "No case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him." This is far from saying that such an exclusive right can not be created by the use of suitable language in the grant. It is only authority for saying that exclusion will not be implied from the naked fact of a grant of that nature.

Doe v. Wood, 2 B. & Ald. 724, contained nothing to take it out of *Lord Mountjoy's Case*. The question was, whether the grant operated as a demise or a license merely. The discussion of the question by Abbott, C. J., shows that the question of exclusiveness, as settled by the language and intent of the grant, was regarded as lying at the foundation of the question, whether the instrument could take effect as a de-

mise. It was not in terms a demise, and could only be made to operate as such when the right intended to be conferred was of such a nature as to be the proper subject of a demise. The consideration of that grant tended rather to strengthen than rebut the presumption that the grantor did not intend to divest himself of the entire property of the minerals; for, instead of its being an entire sum, including the value of all materials subject to appropriation under it, it was a reservation of a share of the minerals as such. The idea of a grant, operating as a sale or demise of the minerals themselves, is distinctly recognized, and the case before the court distinguished from one resting on a grant of that nature.

It is fairly inferable from the case, that, had the grant conferred an exclusive right of mining for a term of years, it would have been regarded a demise, although the subject-matter was not an opened mine, but merely minerals contained in the land. This proposition is as distinctly recognized as it could well be, without being directly ruled by the decision.

Muskett v. Hill, 2 Bing., N. C., 654, while adhering to *Doe v. Wood*, goes a step further, holding, under a grant closely resembling that in *Doe v. Wood*, that a license of that character could operate as a grant in respect of minerals taken under its authority, and therefore constituted an assignable interest in the hands of the licensee. *Clark v. Way*, 11 Rich. 624, applied the principles of *Lord Mountjoy's Case* to the case of a right to take timber in the land of another. The applicability is put distinctly on the ground that the grant contained no words of exclusion. *Caldwell v. Fulton*, 31 Penn. 475, is a leading Pennsylvania case, bearing on this question. The adjudications of the courts of that State, in this branch of the law, are entitled to great consideration, both for the extent and value of the mining operations that have been effected by such adjudications, and for the great learning and experience of the judges from which they have emanated. Apart from the nature of the consideration of the grant in *Caldwell v. Fulton*, it was distinctly ruled by *Lord Mountjoy's Case*. Judge Woodward, who delivered the opinion of the court in a previous case between the same parties, both in that case and in *Funk v. Haldeman*, 53 Penn. 229,

recognized the authority of *Lord Mountjoy's Case*, as reported by Lord Coke, under the weight of authority that had, both in the English and American courts, sanctioned its rulings, but held that the grant then under consideration was to be regarded as a sale, for a valuable consideration, of the absolute and exclusive right to all the coal under the grantor's land.

The opinion in the recent case reported in 31 Penn. 475, was delivered by Judge Strong. This opinion does not so distinctly appear to place the decision on the ground of the nature of the consideration paid, but that such was the turning point of the case distinctly appears in *Clement v. Youngman*, where the same judge states the point decided in *Caldwell v. Fulton*. *Clement v. Youngman*, 40 Penn. 341, contains this important expression: "In *Caldwell v. Fulton* we held that a grant of an unlimited right, title and privilege to dig and take away the coal in a designated tract of land, to any extent the grantee might think proper and for a consideration presently paid, was a grant of the coal itself and not merely a license or incorporeal right." To this view of *Caldwell v. Fulton* the court declares itself as adhering. The grant in that case related to two distinct kinds of material to be found on the premises, namely, iron and limestone. The court held that the agreement was not intended by the parties to confer an absolute right to either the ore or the limestone, on the ground that, as it regards the ore, the only consideration stated was an agreement to pay for the amount of ore actually taken, and as to the limestone, no consideration of any kind was stipulated for; besides the limestone was only to be taken to be used in the manufacture of iron from the ore.

This case is in entire harmony with *Lord Mountjoy's Case* and is distinguishable from *Caldwell v. Fulton* by the fact that there was no consideration stipulated, for that implied a sale of all the minerals of the designated kinds on the premises. It holds that an agreement to pay a stipulated price for the minerals actually taken, estimated upon the quantity taken, is not such a consideration as implies a sale of the whole mineral content. In this last respect the case resembles *Doe v. Wood*, with the exception that the consideration stipulated for in that case was a share of the minerals instead of a fixed

equivalent in money. This case treats the question as to whether the right granted is corporeal as depending upon the intention of the parties as to its exclusiveness as derived from all parts of the instrument construed together: *Gloninger v. Franklin Coal Co.*, 55 Penn. 9.

The grant in this case was held not to be exclusive on two grounds: first, the consideration was a merely nominal sum, \$6.50; and second, the right to take coal was limited to the amount required by the grantee for his use as a blacksmith. In construing that part of the grant that operated to limit the amount to be taken, the court took into account the state of knowledge as to the value of coal and its uses at the time of making the contract.

Graves v. Hodges, 55 Penn. 564, holds that an agreement to pay a stipulated price per ton for ore taken does not import an exclusive privilege. *Grubb v. Bayard*, 2 Wall., Jr., 81, where the consideration was also an amount stipulated to be paid per ton for the mineral taken, holds that the grant was not exclusive. Thus we find, in cases entitled to weight as authority, the proposition that when the grantee has unlimited authority over the subject-matter of the grant, a consideration consisting of an entire sum including the valuation fixed by the parties upon the whole mineral content of the land, or of the class of minerals to which the mining right relates, demandable absolutely under the contract, furnishes evidence of an intent to confer an exclusive right on the grantee. On the other hand the proposition is not disputed by any of the cases regarded as of leading authority on this subject.

This conclusion appears entirely reasonable. No presumption of an intent to reserve any part of the thing granted ought to prevail against ground of reasonable inference that the price received by the grantor is an equivalent for the whole thing granted. Certainly in equity such a presumption could not be allowed to prevail over the manifest equity disclosed by the nature of the consideration.

We are not called upon in this case to decide that the fact of such a consideration standing by itself is sufficient to characterize the contract as intending an exclusive right; but as in the present case there are no other evidences of such intent, we are only required to hold that the existence of such a con-

sideration tends to establish an exclusive intent. We hold, therefore, that the grant to the defendant, Moses, was intended to, and did in fact, exclude the grantor, Massot, from all right to appropriate to himself any of the mineral substance to which the grant relates during the term of the contract, and from conferring such right upon any other person as against the grantee or those of right claiming under the grant.

Had Moses' right been unlimited as to time, the grant would have operated as an absolute sale and conveyance of the mineral itself, as in the case of *Caldwell v. Fulton*. The limitation of the right to ten years prevents it from having this effect, but does not change the character of the grantee's authority during that period, such authority being that due to a full proprietorship of the minerals during the term. The words "sell and convey" can not have their full effect in consequence of the limitation in point of time, but in conjunction with other expressions of the grant, they serve to fix the character of the grantee's power and right as a full proprietorship during such term. This conclusion is not affected by the limitation imposed as to the extent of the surface to be worked at any given time, as that limitation does not impair the right to work the whole, but limits the use of the surface of the ground as an incident to the operation of searching for and removing the minerals.

It is clear that the grant operated as a demise of the minerals for the term of ten years, and therefore the interest of the grantee was divisible.

Three things are necessary to a demise: first, a proper subject-matter; second, possession for a term of years; and third, a right to the profits during such term. The argument, in behalf of the plaintiff is, that the power conferred by the grant does not relate to any thing corporeal, of which possession may be had. If this conclusion be established, it would result, as contended for by the plaintiff, that the power being incorporeal, it was indivisible, and the defendant, having attempted to divide it, had destroyed it.

The answer to this argument is supplied by the authorities, as well as by the reason of the case. The law of England on this subject is stated by Mr. Bainbridge, in his work on the law of mines and minerals, 163. He states that minerals

contained in the land, although unopened as well as opened mines, are capable of forming "a distinct possession or inheritance," and that if it was requisite that livery of seizin should be made of them, still they are susceptible of such livery. That author does not cite the authority of adjudicated cases to these propositions as fully as might be expected. It is, however, not unlikely that this view of the law, so distinctly shadowed forth in *Doe v. Wood*, 2 Barn. & Ald. 924, should have been practically acted upon without further controversy.

In *Doe v. Wood* the question was, whether ejectment would lie in the case of unopened mines, by one having the right to mine, though not entitled as owner or lessee of the land. If property of that kind had been incapable of sustaining a possessory title, the answer to the action would have been complete without any further inquiry in order to ascertain the intention of the parties to the grant. The fact that the court regarded it as important to ascertain whether the parties intended it as a demise, shows, conclusively, that it was capable of acting as a demise, if the parties so intended. This case leaves no doubt as to how the law of England stood, and if no other authority for so doing existed, Mr. Bainbridge would have been justified in stating, in the manner in which he has stated it, the law of that country. *Caldwell v. Fulton*, 31 Penn. 475, holds that, by the law of Pennsylvania, minerals unsevered are land, capable of being held and transferred, apart from the ownership of the land.

This determination necessarily involved the idea that a possessory title could be had "in minerals in place," and therefore we should infer that a grant or conveyance, intended by the parties to operate as a transfer of property of that character, for a term of years, accompanied by an exclusive enjoyment of the profits thereof, would create a demise. There are, however, expressions in *Caldwell v. Fulton* and *Clement v. Youngman*, that involve this deduction in some perplexity, as it regards the effect of the Pennsylvania cases. In these cases stress was laid on the fact that the right of the grantee was wholly unlimited in respect of time, quantity and use. It is not difficult to see the bearing of that fact in *Caldwell v. Fulton*, for there the conclusion that the grant operated to exclude the grantor rested on the fact that the

parties intended a sale and conveyance. It was important to show that the entire interest in the coal was transferred; but it would not seem to follow that there was no other mode by which the grantor could have conferred an exclusive right on the grantee, than by making an instrument that was capable of operating as a sale and conveyance absolute of the whole content of coal.

The difficulty as to the construction intended by the Pennsylvania cases arises from expressions employed in the opinions. The opinion of Judge Woodward, reported in 31 Penn. 475, is clear upon this point. He sought to rest the case upon the inferences arising out of the consideration. From the consideration he inferred a contract of sale of the whole content of coal. His language is, "he sold for a valuable consideration all he had in sixteen acres, and all the coal in his other land. I say all, because the grant is limited to no time or quantity or purpose or person." The absence of a limitation as to time is here referred to as defining *how much* was sold, and not for the reason that such a limitation would be necessarily decisive against the grant operating as exclusive against the grantor.

Judge Strong, in the opinion in the second case that arose between the parties to *Caldwell v. Fulton*, sought to place the right of the grantee on quite different ground from that previously taken by Judge Woodward. His theory of the case started with the proposition that "minerals in place" were land, and might be transferred as such. He then lays down the principle that a conveyance of the whole profit of land is a conveyance of the land itself. In order to apply these principles to the case in hand it was requisite to show two things; first, that coal was a profit of land, and, second, that the grantee acquired a right to the whole profit of coal. In answering the objection that coal being but part of the profit of the land the principle could not be applied, he holds that the subject of the grant being coal, the whole usufruct and dominion were granted. In other words, coal in place was, in itself, land, and might be conveyed as such. It is difficult to understand why, if coal is land, it should be necessary to treat it as merely a profit of land. According to this view a sale of coal was a sale of land *eo nomine*. Why,

then, resort to a principle which is only important when the land, as such, is not conveyed? To the operation of this principle he ascribes the conclusion in *Lord Mountjoy's Case*, *Chetham v. Williamson*, *Doe v. Wood* and *Grubb v. Bayard*. An examination of the cases last mentioned will show that the idea that a conveyance of the profit of land is a conveyance of the land did not enter into the grounds of decision in those cases. Of *Lord Mountjoy's Case*, Judge Strong says that the grant was "only sufficient for a single specified purpose, viz.: the manufacture of alum and copperas"; and thus it was not in conflict. In other words, if the right in that case had not been subject to that particular limitation, it would have been held to exclude the grantor. It is far from clear that the grant in *Lord Mountjoy's Case*, so far as it related to ores, was subject to the limitation that clearly applied to the turf; at all events, that solution was not indicated in the case as reported.

It is very clear that Lord Ellenborough did not so understand *Lord Mountjoy's Case*, when, in *Chetham v. Williamson*, he deduced from that case the proposition that one having a liberty of digging for coals in another's land has not an exclusive right to the coals, as against the owner of the soil. Had the grant in *Lord Mountjoy's Case* been unlimited, as to the purpose for which the grantee should take the turf or minerals, it still would have been only "a liberty of digging" in another's soil, and the remark of Lord Ellenborough would be equally applicable to the case.

The comment made by Strong, J., on *Chetham v. Williamson*, that that case was decided upon the idea that livery of seizin was indispensable, does not appear to be sustained by the report of that case in 4 East. Lawrence, J., says, "the covenant, therefore, can only operate as a grant, but will not pass the land itself without livery."

The allusion to the want of livery arose from the fact that E. Hyde was only the owner of the equity of redemption, and had not the legal estate in him; and as the right to mine was reserved in his deed, it was necessarily unaccompanied by livery, for E. Hyde, not having the legal estate, could not make livery. The remark of Lawrence, J., if entitled to be regarded as disclosing the point of the case, falls far short of

making the assertion that such an interest as an exclusive grant would have created was incapable of being attended by livery. Judge Strong's comment on *Doe v. Wood*, 2 Barn. & Ald. 719, fails to elicit the full import of that case. It was not the fact that the grant was limited to a term of twenty-one years that was the ground of holding it a license. The question was, whether it was a demise or license. If a demise, it would be the limitation of a term of years that would make it such. That, of course, then, was not the turning point as between a demise and a license. Abbott, C. J., states the question as follows: "One of the questions was whether this indenture operated as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein, during the term, upon the condition mentioned, or only a license to work and get the metals and minerals that might be found within the limits described." Here is a clear conclusion that a legal estate in the mines and minerals might be created for a term of years, and so far as to operate as a demise. The question was, then, had the parties done so? The conclusion of the court was, that by the terms of the grant the grantee did not take a present interest in the minerals as proprietor, but that his proprietary right arose only when the minerals were severed from the land. It will be borne in mind that in that case the grantor retained an interest in the minerals themselves in the form of a share of all minerals raised. That decision clearly rests on the idea that the grant was not exclusive, because it was nothing more than a liberty to dig for minerals in the land of another. Had there been anything in the granting part of the deed, or in the consideration, showing that the parties intended it to be exclusive, it is clear that it would have been upheld as a demise. This shows clearly that the limitation, as to time, was not the turning point in the case. That case professed to follow *Lord Mountjoy's Case*; and we are at liberty to conclude that the construction put upon the grant was the result of the principle settled in that case. This view seems to strengthen the idea that has already been advanced in regard to *Lord Mountjoy's Case*, that the court allowed a presumption, in the absence of words of exclusion, that the grantor did not intend to divest himself of his proprietary right as owner of the land, but to admit

the grantee to a participation in certain of those rights. The conclusion of Strong, J., is summed up in these words: "When the intent is to give the entire usufruct and power of disposal, the legal title must be held to pass." Standing by itself, this proposition is not controverted, nor was it necessary to go beyond the mere affirmation of that proposition in *Caldwell v. Fulton*. But it does not follow that because the entire usufruct and power are limited to a term of years, that a legal estate by way of demise will not pass. It will be observed that Strong, J., speaks of "the entire usufruct and power of disposal." There is a well defined distinction between a deed of the usufruct and the power of disposal as it regards its competency as an actual conveyance of the land to which it relates. A deed of the usufruct of land can only convey the land itself under the operation of a rule of construction enlarging the terms of the deed beyond their direct import, on the principle of implication. Not so in the case of a deed conveying the "power of disposal," when such a conveyance is made for the use and enjoyment of the grantee. In the latter case, the subject of the grant is dominion over the land. All that a deed purporting to convey the land, specifically, can pass, is the dominion over the land.

The deed does not affect the physical attributes of the land, or confer on it any quality fitting it to become subject to the dominion of the new owner. It simply transfers to the grantee what the grantor previously possessed. "Power of disposal is dominion over the land."

When, therefore, the deed conveys both the usufruct and power of disposal, it is unnecessary to resort to the rule that conveyance of the whole usufruct is the conveyance of the land itself, for the deed acts at once, by a principle of interpretation within itself, as a conveyance of the land.

Regarding coal as land, the deed in *Caldwell v. Fulton* did not merely convey the usufruct of land, but conveyed complete and absolute power of control over land, for the use and enjoyment of the grantee.

For the same reason, had that deed conveyed the same power of control and disposal for a term of years, it would have created a demise. It is quite evident, from the sum-

mary already quoted, as made in *Clement v. Youngman* as to the point ruled in *Caldwell v. Fulton*, that the court, on mature consideration, was disposed to adhere to the conclusion that the true point of distinction between that case and *Lord Mountjoy's Case* was the difference in the inferences to be drawn from the considerations of the respective grants. No one disputes the validity of a lease of opened mines, nor that such a lease covers the stratum or vein of minerals so far as embraced within the lands described, and is not limited to the openings, which are merely conveniences for getting access to the mineral, nor to the superficial occupation of the ground.

Extensive workings may serve to develop the value of a stratum or vein of mineral, but are not essential to complete the legal idea of property in such substances.

The legal conception of land is that of a right, within the limits of law, to control some part of the earth embracing its surface and content. In general, conveyancing deals only with the surface of the ground, and accordingly we have come to consider surveyor's lines as the true boundaries of property. If we find difficulty in conceiving of the ownership of a vein of mineral as land, it probably arises from the fact that we can not conceive of the outlines of such property being traced by surveyor's lines. But this is a mere superficial idea of land. A man's possessions, as the owner of land, is a solid body of rock, soil and water, bounded by planes instead of lines. There is no good reason why he should not, if he chooses, divide his possessions with those who can make a more advantageous use of it than he can make, by horizontal planes or oblique planes, so long as the law can comprehend and effectuate his purpose.

Such is the practice of mankind, and it is due to the practice of the law that its ideas should keep pace with the habits and usages of practical life.

The notion of accessibility forms no part of the idea of land, yet the difficulty that arises in attempting to form a legal conception of a vein of mineral as land, springs from the idea of its inaccessibility. As it regards livery of seizin, it is not now-a-days a question whether the owner of the soil can reach it, in order to perfect a symbolical delivery, but

whether the statute of uses can reach it so as to give effect to a deed of bargain and sale.

The interest of Moses being a demise it was competent for him to divide it, and therefore the ground of the bill fails, and it must be dismissed with cost.

MOSES, C. J., and WRIGHT, J., concurred.

JEGON V. VIVIAN.

(Law Reports, 6 Ch., App. 742. Court of Appeal, in Chancery, 1871.)

Facts of the case—Lessee for uncertain term working by instroke.

Tenant for life demised the coal under a piece of land for twenty-one years (and for six years subject to the question of his right to demise for such longer period, which point was ultimately decided against him) the lessee covenanting to work the mines in a proper and workmanlike manner and to deliver up the works in good condition, so that such coal works might be continued. The lessees worked under the demise by instroke from an adjoining colliery, situate to the rise of the coal in the demised land, and did not sink a pit so as to work the demised coal from the deep.

They kept no barrier between the two collieries, so that water and air passed from their other colliery, through the demised colliery, into a lower colliery. They also continued to work the demised coal after the expiration of the twenty-one years, claiming to be entitled for sixty years, which claim was, after much litigation, decided to be invalid as against the reversioner. Upon these facts the court *held*:

- ¹**Instroke.** That working by instroke was working in a proper and workmanlike manner.
- ²**Working from the deep.** That they were not bound to sink a separate pit (shaft) for the demised coal.
- ³**Measure of damages.** That the value of the coal, raised by the lessees after the expiration of the twenty-one years' lease, was to be paid for by them at its fair market value as if they were purchasers, all expenses of hewing and raising being allowed.
- ⁴**Continuous working.** That under the terms of the lease the lessees were not liable in damages for not working the coal continuously.
- ⁵**Barriers.** That lessees were not bound to keep up a barrier so as to prevent air and water from flowing through the lessor's mine, and were not liable to pay for way-leave or air-leave.
- ⁶**Special damages—Way-leave defined.** That the lessees were liable for

¹ *Wheatley v. Westminster Co.*, 8 M. R. 554 and note p. 52.

² *Tiley v. Moyers*, 25 Pa. St. 397; *Post WORKINGS*.

³ *Hilton v. Woods*, L. R. 4 Eq. 432; *Post MEAS. DAM.*

⁴ *Abinger v. Ashton*, 6 M. R. 1.

⁵ *Smith v. Kenrick*, 6 M. R. 142.

⁶ *Phillips v. Homfray*, L. R. 6 Ch. App. 770.

any damage done beyond the removal of coal, by working the mine *since the determination* of the twenty-one years' lease, and must also pay for way-leave; that is, for the passage of coal through the lessor's mine since the determination of that lease.

L. G. Gwyn, who died in 1798, by his will devised the residue of his real estates, which included the Cadley estate, in the county of Glamorgan, unto his daughter, Catherine M. Gwyn, for her life, without impeachment of waste otherwise than that by his will mentioned, with remainder to trustees, with remainder to the sons and daughters of his daughter and their issue in tail; and in default of such issue to several persons named in the will as the daughter should by will appoint; and in default of such appointment, to the testator's nephew, Thomas Powell and the heirs of his body; and the testator empowered his daughter and all other persons who might be seized of the estates to grant leases thereof for the term of twenty-one years and no more, taking and reserving therein the best rent that could be reasonably gotten for the same, and so that such leases should commence in possession and not in reversion, and so that the tenants be restricted from waste and from assigning without consent, and also that a special reservation might be made in every such lease empowering the successive tenants for life and their assigns to dig and take away coal, iron ore and other minerals, and to cut down wood. And the testator further directed that it should be lawful for his said daughter to work or contract for, lease, or set out to be worked, all coal, iron ore and minerals under the said estates, and that all the issues and net proceeds and profits thereof should be paid by his said daughter to the trustees of the will, and be by them applied in payment of debts or in the purchase of lands as therein mentioned.

In 1828, Catherine M. Gwyn, the daughter of the testator, married the Count de Wuits.

On the 2d of May, 1840, the Count and Countess de Wuits executed an indenture of lease, whereby, in execution of the powers given her by the will of her father, and of all other powers, the Countess de Wuits appointed and demised, and the Count de Wuits confirmed, unto Joseph Martin, all the mines and beds of coal under three farms which formed the Cadley estate, with full power for Martin, his executors, administrators and assigns to open, search, dig, delve, bore,

raise and use all lawful means whatsoever for the finding and discovering of all or any mines and minerals of coal and culm not already known under the said farms, and to use and work the same, as well as the mines, veins and seams of coal already known, and to raise and land "all the coal and culm which shall be found therein respectively, and for his and their own use and benefit to take, carry away, and dispose of all the coal and culm so to be raised and landed, and also free liberty, power, and authority to and for the said Joseph Martin, his executors, administrators and assigns, and his and their agents, colliers, workmen, laborers and servants, and others lawfully authorized to dig, sink, drive, run and make any pits, shafts, levels, soughs, sluices, watercourses, railroads and other roads, works and contrivances in, over, under or upon the said several farms and lands hereinbefore described, and to maintain and use the same. And also the free liberty, license, power and authority to have and use a sufficient part of the said several farms and lands for laying and placing the coal and culm so to be raised and landed in the course of working the said mines, veins and seams of coal and culm hereby demised, and for laying and placing any other coal and culm, and also to erect, build, set up and maintain on any convenient part or parts of the same several farms and lands, any engines, erections, and machines for the better and more effectual working the said mines or any other mines. And also such houses, hovels and other buildings as may be found necessary or expedient for the use and accommodation of colliers, workmen and laborers, and for the standing and placing of the horses, carriages, implements and utensils which shall be found or deemed necessary or be used in or about the working of the said mines, veins and seams of coal and culm hereby demised, or of or belonging to any other person. And also the like full and free liberty, power and authority for that purpose to raise, dig, take, carry and use all or any of such coal and culm as may be in or upon the said several farms and lands or any part thereof, and also to use, sell and dispose thereof, for the benefit of him, the said Joseph Martin, his executors, administrators and assigns. And also to bring, lay and place on the same several farms and lands all such timber, wood, iron, stone, brick, lime and other materials, as he, the said Joseph Martin, his executors,

administrators and assigns, or his or their agents, servants or workmen shall or may want or have occasion to use or require in or about the erecting, building or repairing of such engines, erections and buildings as aforesaid. And also to do all and every such other acts, matters and things whatsoever in, under or upon the said several farms and lands, or any part thereof, as shall or may be deemed necessary or expedient in or about or for the pursuing or working of the said mines, veins and seams of coal and culm hereby demised, or of or belonging to any other person, and raising and landing the same thereupon, and taking, converting, using, carrying away and disposing of the same to and for the proper use and benefit of him, the said Joseph Martin, his executors, administrators and assigns. And likewise full and free ingress, egress and regress to and for the said Joseph Martin, his executors, administrators and assigns, his and their agents, laborers, servants and workmen, customers and dealers in and upon the said several farms and lands, with horses, carts and other carriages, to and for the getting, taking and carrying away the said coal and culm, or of or belonging to any other person as aforesaid, making such reasonable satisfaction as hereinafter mentioned, to the tenants or occupiers, for the time being, for the same several farms and lands, for such trespass or damage as shall be occasioned therein respectively by reason of the liberties and privileges hereby granted, and using and pursuing the same respectively. To have and to hold, use, exercise, and enjoy the said mines, veins, and seams of coal and culm, and all and singular the liberties, licenses, powers, and authorities and premises hereinbefore expressed, and intended to be hereby appointed, granted and demised unto the said Joseph Martin, his executors, administrators and assigns, from the 25th day of March last, for and during, and unto the full end and term of twenty-one years (and if the said Catherine M. Gwyn, Countess de Wuits, has power or authority to appoint or demise the same by the said power of leasing contained in the said will of the said L. B. Gwyn for the term of sixty years, to be commenced on or be computed from the said 25th day of March last), and to have and to hold, use and enjoy, all and every the coal and culm that shall be found gotten or raised during the said term of twenty-one years (or the said term of sixty years, as the case may be), in or under all or any part of the said several farms

and lands unto and by the said Joseph Martin, his executors, administrators and assigns, to his and their own use and benefit, and as and for his and their own proper goods and chattels, yielding and paying therefor, yearly and every year during the said term hereby appointed, the clear and net rent or sum of £40 of lawful British money, by equal half yearly payments, on the days and times and in manner hereinafter mentioned. And also yielding and paying during the said term hereby appointed the following rents and royalties (that is to say), the rent or royalty of 4s. of like lawful money for each and every wey of coal and culm, over and above and beyond the first two hundred weys to be raised."

The indenture contained covenants by Martin for payment of the rent, the royalties, the rates and taxes, "and also that he, the said Joseph Martin, his executors, administrators and assigns, shall work and carry on the said mines, veins and seams of coal and culm thereby demised, in a proper and workmanlike manner," and for payment to the occupiers of the three farms of satisfaction for the trespass or actual damage done by working the mines aforesaid, or carrying the produce away, or carrying any materials, or done in any other manner by means of the premises or of the liberties or privileges incident thereto. Provision was also made as to compensation for land taken by the lessees. The lessees were bound to keep accounts. The lessees might, by twelve months' notice, determine the lease, and might at all times during the term, remove from the several farms, lands and grounds, any machinery, railways, or works which they had erected or laid down in, under or upon any part of the estate. Also, the lessees might use any water flowing in, under, or over the said estate, and convey and divert any other water from other lands in, under, or over the same, rendering therefor satisfaction for any damage, and make, maintain and use as well such railways, roads and watercourses, in, under, and through, upon or over the farms and lands demised as the lessees should think necessary for carrying the coal and culm which should be raised out of the seams and veins demised. And Joseph Martin further covenanted "that he, the said Joseph Martin, his executors, administrators and assigns, shall, at the end, expiration, or other sooner determination of the term hereby appointed or granted, peaceably and quietly

surrender and yield up unto the said C. M. G., Countess de Wuits, or her assigns, or to such person or persons so for the time being entitled or actually possessed of the said estate expectant as aforesaid, or to whomsoever the said C. M. G., Countess de Wuits, or her assigns, or such other person or persons may direct, all and singular the coal works and mines, seams and veins of coal and culm, quarries of stone and other the premises hereby appointed and granted, and all the pillars made or left for supporting the ground, and also all pits and shafts which shall be then open, adits, levels, drains, and watercourses, and all roads and ways in, upon or under the same lands or grounds, or any part thereof (save and except the engines, machinery, tramroads, railroads and iron-work and wood work of every description hereinbefore mentioned), in good repair, order and condition, so as that the said coal works may be continued, and the pillars worked and raised by the said C. M. G., Countess de Wuits, or her assigns, or such other person or persons as aforesaid, in case she or they shall think proper so to do, and shall and will in case the said Countess de Wuits or her assigns, or such other person or persons as aforesaid, shall by any writing under her, his, or their hand or hands request the same (but not otherwise), fill up and level all and every and such and so many of the said pits or shafts as she, he or they may be required to fill up, level, and restore the said lands and hereditaments into a state proper for cultivation as far as circumstances will permit." And the lease contained many other provisions as to working the coal.

The Countess de Wuits died in December, 1840, without issue, and without having executed the power of appointment given her by the will, whereupon T. G. L. C. Powell, a grandson of Thomas Powell, became entitled to the Cadley estate as tenant in tail, under the will of L. B. Gwyn, and took the name of Gwyn. T. G. L. C. Gwyn barred the entail, and in 1855 agreed to sell to the plaintiff, Henry Ernest, all the rents, royalties, and money due under the lease of 1840 up to the 2d of August, 1856. In 1855 T. G. L. C. Gwyn sold the Cadley estate, subject to the last-mentioned agreement, to one Edgar, whose devisees sold it to Henry Ernest, who thus became possessed of the whole estate. Henry

Ernest afterward mortgaged the estate to the other plaintiff, Trew Jegon. Martin, soon after the date of the lease, assigned it to a company called the Swansea Coal Company, and by various assignments the interest of Martin and of the Swansea Coal Company became vested in the defendants, H. H. Vivian and J. V. Williams.

On the 31st of December, 1860, Henry Ernest filled a bill against Vivian Williams and others, alleging that the lease of the 2d of May, 1840, was obtained from the Countess de Wuits by fraud, and also that it was invalid at law beyond her life estate, and praying an account and payment for the coal and minerals taken by the defendants, and for damage done by working the mines improperly, and that possession might be delivered to the plaintiff. This suit of *Ernest v. Vivian* was heard before the vice chancellor, Kindersley, who, on the 22d of December, 1863, dismissed the bill with costs on the ground of the plaintiff's laches or acquiescence, and without prejudice to any right at law or to any bill he might file admitting the validity of the lease: 33 L. J. Ch. 513.

The term of twenty-one years granted by the lease of 1840 expired on the 24th of March, 1861. Ernest gave frequent notices to the defendants that they were trespassers, and on the 14th of February, 1865, the plaintiff in this suit brought an action of ejectment in the court of common pleas, in the name of Jegon against Vivian, for the recovery of the mines and hereditaments demised by the lease, the question being whether the demise for sixty years was valid.

The action was tried at Swansea, when a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff. The court of common pleas was moved accordingly and a rule granted, which was argued and discharged on the 25th of November, 1865, as reported: Law Rep. 1 C. P. 9. A case was then stated by way of appeal, and on the 6th of February, 1867, the court of exchequer chamber directed that the rule should be made absolute and a verdict entered for the plaintiff, which was accordingly done: Law Rep. 2 C. P. 422.

The defendant appealed to the House of Lords, who, on the 29th of June, 1868, dismissed the appeal: Law Rep. 3, H. L. 285.

Before the appeal to the House of Lords was decided, the plaintiffs had filed a bill in this suit (last amended on the 1st of May, 1868), stating as above stated, and admitting for the purpose of this suit that the lease of 1840 was in equity a valid demise for the term of twenty-one years; and claiming damages and an injunction under the circumstances before and hereinafter stated.

The Cadley estate is of about 289 acres. The Swansea Coal Company had, at the date of the lease, obtained agreements for leases of adjoining collieries, called Mynydd Newydd and Pantynaes, and the plaintiffs alleged, but the defendants denied, that Martin took the lease of the Cadley estate for the purpose of assigning it to the Swansea Coal Company. That part of the Cadley estate which contained the more valuable minerals abutted toward the south upon the Mynydd Newydd colliery, in which the Swansea Coal Company, in or about the year 1843, sank a pair of shafts, or pumping and winding pits, and on which they constructed a railway and other works for the conveyance of coal. The dip of the coal measures under the Cadley estate was to the deep of or slopes down from the coal in the Mynydd Newydd colliery, so that the water from the colliery flowed through the ways and channels cut by the lessees into the Cadley estate, and, as the plaintiffs alleged, would, if not drawn off and pumped up, drown the mines therein; but the defendants maintained that it merely flowed through the Cadley estate into another colliery belonging to the defendants, and was pumped back again and returned to the Mynydd Newydd pit. The Swansea Coal Company worked the coal under the Cadley estate by means of a slant driven from the Mynydd Newydd pit, and took large quantities of coal therefrom. The plaintiffs contended that this mode of working was improper, and that pits and shafts ought to have been sunk upon the Cadley estate, so as to drain and ventilate independently of the adjoining colliery, in which case proper barriers would have been kept to prevent the workings on the Cadley estate from being flooded by water from the collieries to the rise of that estate, and from being rendered dangerous by gases produced in the adjoining collieries. And the plaintiffs stated that some of the workings in the Cadley estate had in

consequence been drowned out and abandoned, as to which however, there was a dispute. The defendants contended that the coal on the Cadley estate was of small value, and could only be worked to advantage from another colliery, and that the costs of a shaft would be £27,000 at least. On these points much evidence was entered into, the effect of which is stated in the judgment of the lord chancellor.

The plaintiff further raised a question whether the £40 dead rent was to be allowed for in the payment of the royalties. They also claimed damages, because the defendants had not worked the coal continuously and had not raised so much as they might have raised. The defendants admitted that from 1844 to 1847 they did not work the coal on the Cadley estate, and did not contend that they had raised all the coal they might have raised.

The plaintiffs also claimed the value of the coal raised since the determination of the lease, allowing for the cost of haulage, but not for the cost of getting and hewing.

The defendants had worked some coal in estates called Pantymaes and Blaenymaes by means of headings driven through the Cadley estate into Mynydd Newydd pit, and had carried the coal and ventilated their pits through the Cadley estate; and the plaintiffs further claimed payment as for way leaves and royalties on this account.

The plaintiffs further claimed damages from the defendants for breaking the barrier between the mines, and asked for an injunction to restrain the defendants from allowing the mines to remain so as to be flooded, and from using the mines for the drainage and ventilation of other mines. The defendants said that the barriers had been broken by those who were working the Cadley colliery before the Swansea Coal Company came into existence, and that when the Cadley coal was worked, the water would have made its way from the adjoining mines to the rise. They admitted that they did not preserve barriers between the mines under the Cadley estate and the Mynydd Newydd colliery and said that they were under no obligation to do so.

The master of the rolls, before whom the cause was heard, was of opinion that as to the coal raised since the expiration of the lease for twenty-one years, the defendants must be

treated as having taken it by mistake; that the defendants were not obliged to sink a pit, and had worked the mine in a proper and workmanlike manner; that they were entitled to use the passages through the Cadley estate during the lease; that they were not bound to work more coal than they had worked. And his lordship directed: 1. An account of what was due for royalties under the lease; 2. An account of all coal and minerals got from the mines since the expiration of the lease, and of the value thereof, the defendants being charged only with the fair value of such coals and minerals at a fair rate as if the mines had been purchased from the plaintiffs; 3. An account of what was to be paid for the passage of coal through the estate since the 25th of March, 1861. That part of the bill which prayed an account of the damage done by working the mines in an improper manner, and by not leaving barriers, and by not sinking proper shafts, was dismissed and no costs were given.

From this decree the plaintiffs appealed. They asked, first, an injunction to restrain the defendants from draining or ventilating through the plaintiffs' mine; secondly, £40 a year as an absolute rent; thirdly, damages for not sinking the pit, and for not keeping up the barriers; fourthly, that the coal taken might be valued, allowing for haulage to the pit's mouth, but not for hewing or other expenses; and fifthly, damages for not working the pit continuously.

Mr. JESSEL, Q. C., Mr. SWANSTON, Q. C., and Mr. JACKSON, for the plaintiffs.

These lessees ought not to drain or ventilate through our mine. They have destroyed the barrier between the pits, and in so doing have destroyed much coal and allowed the water and air from their own pit to run through ours. If they had worked this coal from an independent pit, we should have had the royalty, but now the coal is wasted: *Beaufort v. Morris*, 14 Jur. 607; *Hunt v. Peake*, Joh. 705. They ought to restore the barrier or in some way prevent the water and air from running into or through our pit. We also claim to be paid for the passage of the coal from other pits through our land both during the lease and afterward. In fact, the

lessees have used the Cadley estate not as a coal pit, but as the means of working their own coal pits.

We say that the lessee ought to have sunk an independent pit on our land, and not to have worked this coal by instroke from his own pit. The consequence of his not doing so is that we are not able to go on working, and that the covenants have not been complied with. The master of the rolls was guided by *Lewis v. Fothergill*, Law Rep. 5 Ch. 103, but each lease must be construed on its own terms. This lease clearly contemplates that an independent pit will be sunk. At the time when this lease was granted the lessees had not the adjoining colliery, and therefore neither party could have contemplated working the coal from the adjoining colliery. Moreover, they are bound to yield up the estate so that the working can be carried on, but how can that be done without a pit? As things have happened we have no access whatever to the workings on our own estate, even to view them, without the leave of the defendants. It is admitted that in order to work our own coal we must sink a pit and build barriers to keep out the water from their pit.

The only proper way of working coal is to work from the deep, else the mine is in continual danger, and besides, much coal is wasted. No doubt if Cadley pit and Mynydd Newydd pit had all belonged to the same person, it might have answered his purpose to lose some coal and to suffer the inconvenience of working from the rise. But here the Cadley coal belongs to the plaintiffs, and they are injured, though the defendants may have gained by it. This explains the conflict of evidence on the subject of these workings. But the lessees were bound to work the Cadley coal properly. There is an implied contract to that effect: *Wood v. Copper Miners' Company*, 7 C. B. 906; *Stanley v. Agnew*, 12 M. & W. 827; *Powley v. Walker*, 5 T. R. 373.

The lessees have power by the lease to sink pits, make railways, take lands, and other things, which show clearly that a pit was intended.

As to the amount to be allowed for the coal, we are willing to allow for haulage and raising, but not for hewing or anything else. The plaintiffs are entitled to be placed in the same position as they were when these coals were severed and

became chattels: *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278; *Wood v. Morewood*, Id. 440, n., is merely a *nisi prius* decision. Moreover, here the defendants had distinct notice of our claim, and willfully continued as trespassers: *Wild v. Holt*, 9 M. & W. 672; *Llynvi Company v. Brogden*, Law Rep. 11 Eq. 188. If they had had no notice of our title, they might perhaps be not dealt with so strictly; *Hilton v. Woods*, Law Rep. 4 Eq. 432. We say that the defendants ought to be compelled to rebuild the barrier, so that air and water shall not be allowed to run into our pit; otherwise they are not working properly. They have no right to damage our colliery in this way.

We also say that the covenant to work in a proper and workmanlike manner must mean an absolute covenant to work, and that if the coal has not been sufficiently worked, the plaintiffs are entitled to damages: *Sharp v. Wright*, 28 Beav. 150. It is absurd to suppose that the lessor intended to give up his mines for twenty-one, or perhaps sixty years, with the expectation of receiving £40 a year only. We say that they never really and properly worked the Cadley coal, but only used the Cadley estate for the purposes of the adjoining collieries. They have gotten but little coal, and have injured the estate: *Foley v. Addenbrooke*, 13 M. & W. 174.

At the conclusion of the argument for the appellants, the lord chancellor expressed his opinions that the defendants were not bound to work continuously.

Sir ROUNDELL PALMER, Q. C., Mr. SOUTHGATE, Q. C., and Mr. SPEED, for the defendants.

As to keeping up the barriers, the law is settled by *Smith v. Kenrick*, 7 C. B. 515.

As to the amount to be paid for the coal gotten since the expiration of the lease, the rule in equity is different from that in law. The lessees honestly believed that the lessors had power to grant the lease, and carried the matter up to the House of Lords. Some of the judges of the court of common pleas thought the lease good. The defendants acted fairly and honestly, and must be treated accordingly. At law the action is simply for the conversion of the chattel, and the ex-

pense can not be taken into account; but even at law the expense of carrying is allowed. Here the technical rule of trover does not apply. We admit that we have taken away the coal, and that the plaintiffs are entitled to the value of it in the ground; on any other principle they get the value plus our labor. As to the separate pit, if there was any doubt, it has been removed by the decision in *Lewis v. Fothergill*, Law Rep. 5 Ch. 103.

Mr. JESSEL, in reply.

Here the lessees had not the adjoining collieries at the time when the lease was granted, and there is no reason to think that the lessors expected them not to sink a pit. The natural construction of the lease is that a pit would be sunk. It is admitted that working by dinstroke is injurious, and if that had been intended a distinct provision would have been made for it in the lease. The whole tenor of the lease is the other way. As to the barriers, the defendants have no right to send their water through our land, even though, as they say, it is pumped back.

LORD HATHERLEY, L. C.

One main question in this case is whether the defendants were by the terms of the lease bound to sink a pit on the Cadley estate, so that when the reversioners, who are represented by the plaintiffs, came into possession, they should be able to continue working the mines.

The argument with which I have been chiefly pressed in support of the claim made by the plaintiffs was founded on the provision in the lease that the estate shall, at the expiration of the lease, be delivered up so that the works may be continued. I think a great part of the fallacy of the argument for amplifying that covenant arises from considering it to mean that which might possibly have been anticipated on the part of the lessors as well as on the part of the lessees, when the lease was entered into, as likely to take place; and this was urged before me as an argument to induce the court to introduce an implied covenant which the parties nowhere expressed, because it was said that unless an implied covenant were introduced, that intention which was present to the minds of both parties could not be carried into effect.

Now, the first observation that arises with reference to this clause, which is very often to be found in leases of this description, is that this lease must have been prepared and entered into with due consideration. I am bound to consider that each party understood what suited his own purpose best in entering into such a bargain. In some cases a question has arisen as to the effect of the word "intention." That question was raised in the case of *Rigby v. Great Western Railway*, 10 Jur. 488, 531. There a doubt arose as to whether the company were bound to stop all their trains at Swindon, and the court of common law, 14 M. & W. 811, held that the expression of that intention was on the face of it equivalent to a covenant. But it is entirely unnecessary to enter into that question here, for no intention is referred to, and a covenant can not be implied which the parties have not thought fit anywhere to express. That would, in my opinion, be a monstrous stretch of the doctrine applicable to such cases.

It has further been argued that giving the lessees power to do certain acts implies a covenant on their part to do them; but that is a complete inversion. The lessee has secured to himself certain advantages without introducing any corresponding obligation.

The demise is simply of the coal, not of the surface. [His lordship then read the demise.] The argument upon that is that there is the fullest possible power to work the mine and to take any lawful means of raising the coal, and this, according to the decided authorities, includes the very power of working from other mines if the lessee has them. There is the power of making roads in, over and under, to carry not only those coals which may be gotten out of this particular mine, but also the coal from other mines. Then there is the power to raise the coal to the surface. Then comes the power of pursuing the veins under ground, and of working the veins demised in connection with other veins, for the purpose of pursuing, raising or bringing the same on the lands demised.

Power is given to dig pits, to bring coal to the surface, to make roads, and carry coal on the surface, because the surface is not demised, and the lessee would be unable to carry his coals over the estate without this power; but I can not infer from that a negative, and that the lessee is not to work the

coal by any other method. If he is the owner of the neighboring mine he may do what he pleases, and no power was needed in the lease to enable him to do so; but in order to do anything on the surface which belongs to the lessor he must take a power. That power he accordingly takes, and I am asked to infer that he is under an obligation not to use the larger power which is given him by this lease to work by all lawful means. He was able to work the adjoining mine, and he took care to secure to himself powers to carry the coal he raised from that mine as well as the coal he might raise from the demised mine, over the surface of the Cadley estate; but he has entered into no obligation to work by means of that surface only.

There is nothing else in the lease which appears to concern the sinking of a pit, except the covenant to work the coal in a proper and workmanlike manner. It can not be said that working from your own mine, if you have power to do it, is not working in a proper and workmanlike manner. No one can say that working by instroke is improper *per se*; and the foundation of much of the evidence on that subject was that an intention must be implied that the mines were not to be worked from the adjoining pit, and were only to be worked from the lessor's estate.

I was much pressed with the clause which provides that the lessee shall give up the pits and other works, so that the coals may be continued to be worked by the lessor. This is said to show that it is implied throughout the lease that pits shall be sunk; and here I make the same remark which I made at the beginning, that both sides most probably thought that pits would be sunk; but that does not amount, in my mind, to a covenant to make them. The words are, "all pits and shafts which shall then be open." That implies that they may or may not be open. What was there to prevent the closing of the pits before the expiration of the lease? and if they are not open at the expiration of the lease, they are to be handed over in that state. Then, further, there is this, that they are to be given up in such a condition as that the works may be continued. Now, how can it possibly be said that the works can not be continued, when the lessor has got his own surface land, and may, by sinking a pit, go down and work

the coal at any time he pleases? The whole controversy is whether the lessee or the lessor is to pay this sum of £27,000 for a pit. The lessor can sink his pit, and he has a right when he has sunk his pit to find all the works in such a state as will enable him to go on in the same manner as the previous lessee did. Other people may have their means of access and he may have his means of access. But whatever they do to his property, they are to leave his property so that whenever he takes possession of it he may be able to work and to sink pits for himself, and not find the whole colliery flooded with water and pillars not left, but find it in a proper condition, so that he may go on with the works.

Then it is said that he can not go on with the working of this mine if he has first to sink the pit, and that carrying on the works must mean that they are to be carried on just as unremittingly as they were before. I should not be inclined to give much weight to that observation as an inference for importing a covenant of this extremely onerous nature. I find that there is a power to the lessee to remove all the machinery, railroads, tramroads, iron work and wood work; and if that was done, I apprehend that the lessors would have to build an engine and lay down railroads and tramroads, even if the covenant extended to saying that there was to be a pit. However, I think the best answer to that is, that if the parties meant such a covenant they have not expressed it. And if there had been such an obligation in the deed, I apprehend the lessors would not have gone on from the year 1841 down to the present time without attempting to enforce their rights. It ought to have been insisted upon at first, but nothing of the kind has been suggested, and no attempt has been made to force the lessees to work the mines by outstroke instead of instroke; this is a mere after-thought, in order to compel the defendants to spend £27,000 upon this mine.

Then as to the continuous working: It must be remembered that the subject-matter is a coal mine, and there are various provisions about working coal. An obvious remark upon that would be that where one person is taking a mine and another person is letting a mine, they both think that the mine will be worked, and in numerous leases which have come before the court there is a covenant on the part of the lessee

to work the mines continuously, and there are other provisions of that kind; but when that is intended it is stated. A lessee entering into such a covenant can not complain if he is unable to fulfill his engagement, but here there is nothing of the sort. It is said that because the lessee covenants that he will do the work in a workmanlike manner, he has covenanted to be always working. But there are various approved modes of effecting such a purpose. One is, to take so heavy a dead rent as to make the lessee find it to his own benefit to work, because the rent must be paid whether he works the mine or not. Another mode is to have an express covenant that he shall continuously work. Another mode is to say that so much coal shall be raised per annum; but to say that this is to be implied from a covenant to work in a workmanlike manner would be a very great stretch of the terms actually employed. If the parties meant the lessee to work continuously, they ought to have said so. It is true that there is no dead rent reserved of such an amount as to compel him to work; but I can not say there is anything on the face of the lease to justify me in saying that this mine was intended to be continuously worked, and I can not strain the words so far as to say that the lessor has secured it by any covenant or engagement in the lease.

[His lordship then expressed his opinion as to the mode in which the £40 rent was to be calculated.]

I come now to another question, which is the question of the way-leaves. The master of the rolls gave them, and there has been a question raised about the water-leaves and the air-leaves as they are called. It is said that something should be paid, either in respect of damages or in the way of rent, in respect of those way-leaves or air-leaves. It must be after the expiration of the lease; there is nothing at all said about any such leaves in the lease. But there is another question raised; and that is, about the damage done; and the argument is put thus: You have had the benefit of water-leaves and air-leaves since the expiration of this lease, and for those privileges you must compensate us, and the damage done to the pit can be best measured in that way. Now, I apprehend as to all that was done during the lease, there is no question at all. During the continuance of the lease the

lessee had a right to make any conduits he pleased for the conveyance of water over the demised premises. After the lease he would not be bound to put any barrier between his own mine and those mines which were demised to him, in order to prevent the water running by the action of gravitation from his own mine into his neighbor's mine; and there is no doubt the waters would find their way into this channel which he has made, and which it was perfectly lawful for him to make. I do not find he made any channel in his mine during the term of the demise, in order that the water might pass through it. What he did was, he cut drifts and ways; and the only evidence I have before me on the subject, as far as there is any evidence at all, is, that by the simple force of gravitation the water in these drifts has found its way down. If the plaintiffs are so minded they may stop up those channels, or do anything they please with them. They can prevent their being in any way used; but the defendants not being obliged to use them are not to pay, because those channels, so long as they exist, bring the water down to other mines of the defendants lying to the deep whence they pump the water back.

[His lordship then expressed his opinion that the pumping by the defendants did not increase the flow of water, and that the passage of air was like that of water.]

If the plaintiffs are so minded they can at any time deprive the defendants of all benefit from the passage of air and water. They can build a wall as a barrier between their mine and the defendant's mine; but the defendants are not bound to build any wall at all; they are simply enjoying that which is given them by the mere circumstances of a series of lawful acts which have been done, and which (the lease now being over) the plaintiffs can put an end to if they like. It gives no right to the plaintiffs to recover compensation.

On the other points I reserve my judgment.

Jan. 25. LORD HATHERLEY, L. C., said that, under the circumstances of the case, he should not interfere with the decree of the master of the rolls as to the costs, and that he thought that as no special damage was shown to have been caused by the flowing of water through the Cadley pit, occasioned by improper working during the continuance of the

lease, but only such as would occur from the ordinary working, nothing was to be paid on that account. He then said: "But I think the question is different as to what may have taken place in the workings since the 25th of March, 1861, because from that time the defendants were not entitled to work the mine at all. There is some evidence of damage from the mode of working the mine since that time, though not very strong, yet sufficient for me to say that there ought to be an inquiry what is proper to be allowed to the plaintiffs as compensation for such damage." [His lordship then gave directions as to the £40 rent, and continued:] "Now I approach the question of the allowance to be made for the coal worked wrongfully after the expiration of the lease, the value of which is to be accounted for, subject to deductions—one deduction being, according to all the authorities, for the haulage and bringing the coal from the bottom of the pit up to the pit's mouth. But the question now is, whether or not there is also to be allowed to the defendants that which the master of the rolls has allowed, the cost of winning and getting—that is to say, detaching the coal from the solid rock, and converting it into what is by the authorities held to be a chattel."

I must say that the doctrine of the courts of law on this subject does not seem to me, if I may venture to say so, to be in a very satisfactory state. The courts of law seem clearly to have decided, in *Martin v. Porter*, 5 M. & W. 351, that the hewing was not to be allowed for; on this principle, that the defendant, being a trespasser, and having converted into a chattel that which was part of the freehold, the freeholder or reversioner was entitled to the chattel so converted at the moment it became a chattel; and as it became a chattel at the bottom of the pit, the courts of law did not allow for the process which converted it into a chattel, but they did allow for the expense of afterward bringing it up from the pit, that being the value which they thought to be the measure of the damages to which the plaintiff was entitled.

A part of the reasoning in that case and in some of the other cases was, that the owner may claim a chattel wherever he finds it. If that were so, he might claim the coal at the top of the pit without making any allowance at all. But that

does not seem to be the principle which has been acted upon. Then there was another principle suggested by Mr. Justice Coleridge, 3 Q. B. 279, that the proper value was what the owner had lost, which was the value of the thing as it existed unhewn in the pit, because it was in that state when he lost it, and that was what he was deprived of. However, the learned judge deferred to the decision in *Martin v. Porter*, and submitted to that rule. Now it strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked without any expense for getting and hewing. Suppose the mine worked out, then what he has lost is the coal, but this rule would give him besides all the cost of getting and hewing. It seems a rough-and-ready mode of doing justice, though the remark that a willful trespasser ought to be punished is worthy of observation; and further, as was said by one of the judges, when you deprive a man of his property in this way, you deprive him of the management and control of his own property, and he might have made a better bargain. All that, however, is of course speculative, and it seems to me that the judges have founded their decisions upon the ground of willful trespass, as in *Martin v. Porter*, 5 M. & W. 351, where Mr. Baron Parke expresses himself pleased with the rule as laid down. But the same learned baron, in *Wood v. Morewood*, 3 Q. B. 440, n., held that where there was a *bona fide* claim of title the trespasser would be allowed for hewing as well as for the other expenses. That was no doubt a *nisi prius* decision, but it was adhered to by the learned judge. I can not, however, say that this doctrine is very satisfactory; and no doubt it is open to Mr. Jessel's remark, that we can not dive into a man's mind and know whether he thinks the title to be good or bad; and I doubt if we can say that the other judges agreed in all these views.

In that position of the legal authorities I do not feel disposed to introduce in equity a mode of assessing damages according to a stricter rule of damages than that which has been applied at law. This court never allows a man to make profit by a wrong, but by Lord Cairns' act the court has the power of assessing damages, and therefore it is fairly argued here that this is a case in which damages ought to be reckoned

according to the rule in *Martin v. Porter*. Now, no doubt these defendants were told over and over again that the plaintiffs disputed their title, but they held under a lease, which professed to give a title if the lessors had power so to do. The working went on that assumption, *bona fide*, as it seems to me, and after long litigation the House of Lords held that the lease was not valid, and therefore the defendants were wrongdoers *ab initio*. [His lordship then commented on the proceedings in *Ernest v. Vivian*, and on the proceedings at law, as showing that the case of the defendants was not flimsy, but that they were acting *bona fide*.]

I think, looking to what has been determined at law and looking to what the course of this court was until Lord Cairns' act was passed, I do not feel called upon to give, in the nature of damages, that which, in accordance with the decisions, would apparently not have been given at law by way of damages. I think that the milder rule of law is certainly that which ought to guide this court, subject to any case made of a special character, which would induce the court to swerve from it; otherwise, on the one hand, a trespass might be committed with impunity if the rule in *pœnam* were not insisted upon; so, on the other hand, persons might stand by and see their coal worked, being spared the expense of winning and getting it.

These plaintiffs are clearly entitled to be recompensed for any damage done beyond the actual value of the coal in the course of their working, and I ought to observe that there is a good deal of difficulty in knowing how exact justice can be done in such a case, as the prevention of the plaintiffs from themselves letting their coal is in itself a serious inconvenience and injury; and the only remark I have to make on that point is that the plaintiffs have themselves been dilatory in their legal proceedings, though they have given abundance of notices to the defendants. The plaintiffs now get the whole value of the coal dug, and the coal not dug remains for them, subject, of course, to the question how far it has been damaged.

His lordship then said that the variations in the decree did not make any serious difference in the matter of the costs of the suit, as to which he agreed with the master of the rolls, the plaintiffs having been partly right and partly wrong. He gave no costs of the appeal.

MINUTES: Vary decree of the master of the rolls.

Direct an account of what is payable for rent and royalties under the lease, and in taking that account the 4s. per wey, payable after the first 200 weys, be calculated in each year, subject to deduction of the said 200 weys. An account of coal and mineral got from the mines since the 25th of March, 1861, and of the value thereof, the defendant, to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district. An inquiry as to damages beyond the removal of the coal occasioned by working the mines since the 25th of March, 1861, and what should be allowed as compensation. An inquiry of what ought to be paid by way of way-leave for the passage of coal through the mines since the 25th of March, 1861. Dismiss so much of the bill as asks for damages for not sinking a pit. No costs of the appeal.

Solicitor for plaintiff: Mr. J. LOTT, agent for Messrs. Darvill & Co., Windsor.

Solicitor for the defendants: Mr. W. M. HACON.

BELL V. TRUIT.

(9 Bush. 257. Court of Appeals of Kentucky, 1872.)

¹ **Mutual mistake—Contract to sink for oil where none exists.** A party covenanted to sink for oil within twelve months or pay \$25 per annum until work commenced. In action for this sum the defense was that the contract was founded on a mutual mistake as to the existence of oil on the lands. *Held*, that it was a penalty, and not liquidated damages. 2. That the defense was one which should have caused a transfer of the case to equity; and 3. That if the defense were true, it would in no event justify a recovery of more than nominal damages.

Penalty—Liquidated damages. The law prefers to treat a sum payable as a penalty rather than as liquidated damages, because then it may be apportioned to the actual loss.

W. C. IRELAND, for appellant, cited *Schute v. Taylor*, 5 Met. (Mass.) 61; *Willis v. Caperton*, 13 Allen, 25.

¹ *Roosevelt v. Dale*, 6 M. R. 377; *Harlan v. Lehigh Co.*, 8 M. R. 497.

ROE & BENNET, for appellee.

Chief Justice HARDIN delivered the opinion of the court.

This action is founded on the following stipulation of a contract entered into by the parties on the 21st of January, 1885, for leasing to the appellant the privilege of using the appellee's land, to bore and excavate for oil, and, if successful, to remove the same, paying one eighth part thereof to the appellee as royalty.

"The party of the second part covenants to commence operations for said mining purposes within twelve months from the execution of this lease, or thereafter pay to the party of the first part twenty-five dollars per annum until work is commenced."

The defendant by his answer pleaded that, notwithstanding the form of this stipulation, the contingent obligation to pay the twenty-five dollars per annum was not intended as a covenant for liquidated damages, but as a penalty merely, enforceable according to the damage which might be sustained by the breach of the covenant to commence operations; and the fact being satisfactorily established by many unsuccessful attempts to obtain oil in the same locality, that operations under the contract in this case would have resulted only in loss and inconvenience to both parties, the plaintiff was therefore entitled to no recovery. He, moreover, sought by appropriate cross-pleading to be relieved in equity from the contract entirely, on the ground that it was executed in consequence of a mutual mistake of himself and the plaintiff as to the existence of oil on the plaintiff's land. The evidence is, we think, sufficient to sustain the allegation of the answer, but the court below, holding, as we presume, the obligation above set out to be a covenant for liquidated damages, rendered a judgment for the plaintiff, from which this appeal is prosecuted.

It is, as we conceive, correctly said in the case of *Schute v. Taylor*, 5 Metcalf, Mass. 61, that "the question, what is liquidated damages and what a penalty, is often a difficult one. It is not always the calling of a sum to be paid for breach of contract, liquidated damages, which makes it so. In general,

it is the tendency and preference of the law to regard a sum stated to be payable, if a contract is not fulfilled, as a penalty, and not as liquidated damages, because then it may be apportioned to the loss actually sustained." This doctrine being, as we conceive, applicable to this case, and it not appearing from the evidence that the appellee would in any reasonable probability have been benefited by a compliance with the undertaking to commence operations by boring or mining for oil on his land, he should in no event have recovered more than nominal damages for the breach of appellant's covenant; but the case should have been transferred to equity for preparation and trial, on the appellant's claim to be relieved for mistake in the contract.

Wherefore the judgment is reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

LORD ROKEBY V. ELLIOT.

(Law Reports, 13 Ch. Div. 277. Court of Appeal, 1872.)

Expenses of "winning" where separate seams are worked. By deed of grant and license the licensee was allowed to win and work all the coal mines and seams of coal under certain lands, and, in the first place, out of the profits to reimburse himself all expenses incurred in the winning thereof; and from that time he was to pay a royalty to be fixed. There were three seams of coal under the land. The licensee reached one of them by a driftway from an adjoining colliery and worked the coal; by similar means he afterward reached and worked another of them; the third was reached but abandoned as worthless. *Held*, that the coal was *won*, according to the meaning of the deed, as soon as the first seam was reached through the driftway so it could be worked; that the deed did not contemplate a distinct winning in respect of each seam; and that therefore expenses incurred after the first seam had been reached could not be treated as expenses of winning.

Winning defined. A coal field is won when full, practicable, available access is given to the coal hewers, so that they may enter on the practical work of getting the coal.

Mixture of coals. The licensee mixed coals gotten under the license with those gotten from his own colliery, and sold them together. He alleged that the coals gotten under the license were inferior to his own coals. *Held*, that as they had been mixed by the licensee's own act he was not

¹ *Butte Co. v. Vaughn*, 4 M. R. 552; *Foley v. Addenbrooke*, 8 M. R. 349

entitled to an inquiry as to how much the selling price was affected by the mixture.

Interest. *Held*, that interest at five and not at four per cent. ought to be allowed on the expenses of winning.

This was an appeal by the defendants from a decision of Mr. Justice FRY, 9 Ch. D. 685.

KAY, Q. C., NORTH, Q. C., and WILLIAMSON, for the appellants.

We say that the coal was not won till the year 1870, when the ventilating shaft, which was necessary for the safe working of these mines, was completed. We contend, further, that the three seams of coal are to be treated separately, and that the seams were not to be treated as all won when the first seam was reached. We further say that even if the decree is right in other respects, the defendants ought to be allowed interest at the rate of £5 instead of £4 per cent., and that the coal which has been got from this colliery being of an inferior quality to that got from the defendant's other mines, ought not to be treated as having been sold at the average price got for the whole of the coal which the defendants have disposed of.

COOKSON, Q. C., and H. A. GIFFARD, for the plaintiff.

We submit that the decree is right in treating the coal as won when it was so reached that it could be gotten, and that the winning can not be treated as suspended till the completion of the shaft, which was not begun until a large quantity of coal had been gotten. The proviso treats the winning as one act to be done once for all, and it would be an unnatural and inconvenient construction to hold that there are separate winnings for separate seams. The defendants have mixed the coal, so that the price of the coal from this colliery can not be distinguished, and by their answer they treat the coal as sold at the average price; there ought not, therefore, to be any inquiry for the purpose of apportioning the price.

KAY, in reply.

Dec. 18. JAMES, L. J., now delivered the judgment of the court (JAMES BAGGALLAY, and THESIGER, L. JJ.).

In the year 1775, Mr. Tempest was the owner of three fourths and Mr. Montagu the owner of one fourth of the property known in this suit as the Barmston property. Mr. Montagu, by an indenture dated the 7th of March, 1775, conveyed his fourth to Mr. Tempest, reserving the minerals, with respect to which, however, the deed contained the following provisions: [His lordship read the proviso set out in the previous report.]

The plaintiff represents Mr. Montagu. Mr. Tempest's interest became vested in the Marchioness of Londonderry. By an indenture dated the 5th of November, 1864, the Marchioness demised the minerals to the defendants subject to Lord Rokeby's interest therein. And it has been agreed by both sides that for the purposes of this suit the defendants represent Mr. Tempest, and that the questions between them are to be determined as they would have been between Mr. Tempest and Mr. Montagu. The defendants being the owners or lessees of an adjoining coal field, working three veins, have from such adjoining coal field worked to the three veins, and (one of them proving worthless) have worked the other two, and extracted therefrom coal to the extent of hundreds of thousands of tons; and the question between the parties is whether and when the time arrived at which Lord Rokeby became entitled to have his quinquennial royalty or tentale fixed under the deed, and that resolved itself into a question when the winning was made according to the true intent and meaning of the deed.

The judge in the court below was of opinion that such winning was made on the 15th of July, 1864, when the first seam was reached and began to be worked. He adopted the definition of winning given in the case of *Lewis v. Fothergill*, Law Rep. 5, Ch. 103.

The main contention on the part of the defendants was that it was a necessary part of the winning foreseen from the first, and part of the original scheme and plan of winning, that there should be a shaft sunk to provide for the additional ventilation rendered necessary by the fiery character of the

coal in this property, and that although that shaft was not begun until the year 1867, after the coal had been very extensively worked, and not completed until the year 1870, by which time nearly 400,000 tons had been extracted, the winning is not to be considered as made until the shaft had been so completed.

We should be unable to concur in that contention, even if the fact had been made out, which we think it is not, that there was any such original plan and scheme. We think the definitions of winning given in the case of *Lewis v. Fothergill* are accurate, as accurate as definitions can be of a term like winning, which probably is itself as intelligible and plain as any definition can be.

A coal field is won when full, practicable, available access is given to the coal hewers, so that they may enter on the practical work of getting the coal; and this was certainly true of the principal seam on the day fixed by the judge. But another contention was made, that each seam was to be treated distinctly, and that the provisions of the deed were to be applied to each seam as if they were separate collieries. Neither of the parties seemed, however, to be quite sure for whose benefit such distinction, if made, would inure. It is more than doubtful whether it would be for the benefit of the defendants. But we agree with the learned judge that the construction (which would lead to the most inconvenient results) is not the true construction of the deed. It would require distinct accounts of the winning and of the subsequent workings and of the profits and distinct arbitrations to fix distinct royalties for distinct quinquennial periods. It is possible and easy to conceive workings of several veins or several portions of the coal fields so entirely separate as to make it right and proper that there should be such distinct accounts, distinct arbitrations, and distinct royalties. But we do not think that is so where the seams are won to be worked together, and are worked together as one colliery. This contention is, in truth, wholly inconsistent with the main contention of the defendants, that the whole constituted one winning not completed until the new shaft for ventilation was completed. And in fact, until the hearing, no such suggestion appears or was thought of. The coals from both seams were sold together,

and the schedules to the answer treat the winning as one winning and the produce as the produce of one colliery, just as all the veins in the adjoining liberty are one colliery, and just as the three veins are one entire taking as between Lord Vane and the defendants. Nor is there in this any hardship or injustice to the defendants, for where the winning expenses end the working expenses begin, and the working expenses, not included in the winning, would of course have to be charged against the produce of the coal in ascertaining the profits.

The exact time at which the royalty is to begin is when the produce of the sales has recouped all the expenditure. At that time the new relation between the parties is to commence. Up to that time all the expenses and all the sums realized belong to the common fund. From that time all the expenses and all the sums realized belong to the assigns of Mr. Tempest, subject to the payment of such royalty as arbitrators should fix, having regard to all the circumstances of the case and the mining prospects of the coal field. It may be that in the first year or years the total expenses of winning and working might be comparatively small and the sums realized very great, so as soon to balance the account and bring the royalty into existence, and that immediately afterward, from the change in the coal field, from the exigencies of the work, from the vicissitudes of the market, the expenses might become very great and the results very small, so that a royalty would be payable while the work was being prosecuted, not only without profit, but at a loss. On the other hand, it might take years before the winning expenses are recouped, and then things might so change that with a very small royalty large profits would be realized. But these are the chances of every such work, and Mr. Tempest took upon himself those chances for better or worse.

In the view we take of the case the declarations in the first part of the decree become of little, if any, importance. Practically, as accounts of the winning expenses and accounts of the working expenses have to be taken, it will be found, we think, to resolve itself in great measure into a mere account of payments and receipts, so as to ascertain whether and when the receipts exceeded the payments. If that date should be

found to be anterior to some heavy expenditure by the defendants, so much the worse for them; if, on the other hand, it should be found that there was a pound undischarged when such new expenditure was incurred, so much the worse for the plaintiff, as the account must be open until a balance of payments and receipts is arrived at. It will not be absolutely a simple account of payments and receipts, for a proper allowance and deduction would have to be made in respect of any machinery, plant, and other effects which, at the dividing date, would be available for the continued working, and which, of course, would be the property of the defendants, and a portion — probably a large portion — of the working expenses would have to be ascertained by some apportionment between the two coal fields which were worked together.

The defendants complain of two other parts of the decree, one, that which allows interest at four per cent. only, and the other which charges them with the actual sale prices of the coal. As to the first, which is of small importance, it is to be borne in mind that in merchantable matters, in matters of industrial speculation, the ordinary rate of interest as understood by men of business, the one which would be given by a jury, is five per cent., and we think that ought to be given in such a case as the present.

The other complaint arises thus: It is alleged that the coal got from the property in question was inferior to the coal got from the defendants' other coal field, but that it was all mixed and sold together at one price. And it is contended that the price of the mixture ought to be analyzed and divided between the two qualities of coal, according to such qualities. But the learned judge was of the opinion that the coals having been so mixed by the defendants' own act, it is not open to them to compel the plaintiff to go into an inquiry as to how much the price of the mixed mass was diminished by the admixture. If it was not diminished, there is nothing to apportion; and we agree with him in this respect. Moreover, the defendants themselves, in the schedule to their answer, have professed to give the sale prices of the coal and to charge themselves with such prices. Such sale prices must, of course, mean the actual prices paid by the purchasers, and not any hypothetical price, deduced by a calculation based on such actual prices and the

proportions of the coal mixed. They have, therefore, determined this question for themselves. The result is that the judgment will be affirmed, with the variation as to interest, which does not affect the costs, and the appellants must pay the costs of the appeal.

Solicitors: FREERE & Co.; WILLIAMSON, HILL & Co.

GRIFFIN V. FELLOWS ET AL.

(*81 Pennsylvania State, 114. Supreme Court, 1873.)

The "Connecticut title" to lands in the "17 townships" of Luzerne county considered.

¹ Void lease validated by receipt of rent. The reception of rent for a great length of time may confirm a lease which may have been void in its inception.

No forfeiture by tenant's agreement to convey. A lessee entered into articles of agreement to sell and convey the leased premises, in fee: *Held*, that even a conveyance would not operate to produce a forfeiture of the lease unless it were a conveyance of such a character as would displace or divest the estate of the reversioner by effecting a disseizin; and if a conveyance by bargain and sale would not so operate, much less would a mere agreement to convey.

Warranty and habendum in construing lease. A lease of lands containing the words "mines and minerals" in the *habendum* clause, and the covenants of warranty extending to "the aforesaid premises with every right and privilege and appurtenance to the same belonging:" *Held*, to allow the working of mines, although no mines were open at the time of the making of the lease.

Lessee can not open mines. The opening of mines by the lessee where none were open at the time of the letting, with no provision in the lease allowing such privilege, would work a forfeiture and allow the lessor to recover in ejectment.

² Office of the habendum. The *habendum* determines what estate is granted, and may lessen, enlarge, explain or qualify the estate in the premises, and, unless totally repugnant to it, is to be construed as if contained in the first part of the deed.

Implied grants. When anything is granted all the means to obtain it and all the fruits and effects of it are also granted. By the lease the lessee took the "mines and minerals" and every "privilege" thereof; this gave him the right to the minerals and the right to dig for them.

³ The term "minerals" embraces everything not of the mere surface

¹ *Doe v. Morse*, 1 Barn. & Ad. 365.

² *Fogus v. Ward*, 5 M. R. 1.

³ *Rosse v. Wainman*, 14 M. & W. 859; *Post MINERALS*.

used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils are comprehended within it.

¹ **Usage aids construction.** An ancient grant is to be construed by evidence of the manner in which the thing granted has always been possessed and used. Even if the right to mine were doubtful *it seems* it might be implied from long continued acquiescence.

March 12, 1873. Before READ, C. J., AGNEW, SHARSWOOD, and MERCUR, JJ., WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of Luzerne County of January Term, 1873. This was an action of ejectment commenced May 24, 1866, by Joseph Griffin against Joseph Fellows and others, for a tract of land in the borough of Hyde Park, Luzerne county, containing fifty acres, more or less.

The land was in what was the township of Providence, one of the seventeen townships in Luzerne county.

On the 8th of September, 1796, James Bagley and others, legally appointed a committee, and duly authorized by the proprietors of the said town of Providence "to let and lease out the public lands of the said proprietors, and lying in the township of Providence aforesaid, for such a term as they, the said committee, should think proper," leased to "Joseph Fellows, his executors, administrators and assigns," a tract, "part of said public lands situate in said town of Providence," describing it; also, another tract, "situated in said town of Providence, and also a part of said public lands," describing it; also another, "situated in Providence aforesaid, and also a part of the said public lands," describing it, "the whole containing * * * one hundred and five acres, be the same more or less."

"To have and to hold the above granted and demised premises with every privilege, right, member and appurtenance whatsoever to the same premises belonging or in anywise appertaining, whether ways, waters, watercourses, mines, or minerals of whatever description, to the said Joseph Fellows, his executors, administrators or assigns, for and during and until the full end and term of nine hundred and ninety-nine years, fully to be completed and ended. Yielding and paying therefor yearly, and every year during the said term, to

¹ *Pratt v. California Co.*, 1 West C. R. 87.

the said proprietor's committee or such other person appointed by them to receive the same, the sum of four pounds, four shillings * * * And also clearing and fencing within four years of the date hereof eight acres of the said premises, and reserving on the said premises for timber and firewood, ten acres, and not in any manner destroying the timber of the same premises, except for clearing, fencing and building in and upon the same till there are improvements sufficient to let out for seven pounds, ten shillings a year * * * And it is hereby covenanted that if the said reserved rent shall be behind and unpaid for the space of sixty days * * * it shall and may be lawful for the said proprietor's committee or such other person as may be appointed by them to seize upon the goods and chattels that shall or may be found in or upon the same premises, and dispose at public vendue, sufficient to pay the said rent and costs attending the same. But if no such effects can be found upon the same premises, that it shall be lawful for the said committee or person appointed as aforesaid, to re-enter the same premises, and after public advertisement for that purpose, lease out the lands to the best bidder, for such a term as will or might pay the said arrearage of rent and expenses attending the said execution. And at the end of the said term which the said premises were leased for under the said execution, it shall and it is hereby declared lawful for the said Joseph Fellows, his executors, administrators, or assigns, to take immediate possession of and re-occupy the whole and every part of the same lands, for the remaining part of the term that shall be then unexpired * * * And the said James Bagley, etc., for themselves, and on behalf of the said proprietors, do hereby covenant and agree to and with the said Joseph Fellows, his executors, administrators and assigns, that he or they shall and lawfully may have, hold, occupy, possess and enjoy for the term aforesaid, all and singular, the aforesaid premises, with every right and privilege and appurtenance to the same belonging, and the same and every part thereof will warrant and defend against the claims and demands of all persons whomsoever claiming the same under the Connecticut title."

The lessee went into possession under the lease and continued in possession, paying the taxes, until August 11, 1815,

when his estate in the property was sold by the sheriff to George Denison, Esq., who, on the 22d of October, 1815, conveyed to Joseph Fellows, Jr., one of the defendants, who with others has continued in possession.

On the 2d day of April, 1831 (Pamph. L., 367), an act was passed, reciting that the townships of Wilkesbarre, etc., three of the seventeen townships of Luzerne, had laid out certain lots in them and appropriated them to charitable uses, etc., and committees had been appointed by the proprietors of the respective townships, to lease, etc., said lots, and the commissioners appointed under the act of April 4, 1799 (3 Sm. L. 362), and supplements of March 5, 1800 (Id. 435), and April 6, 1802 (Id. 526), authorizing compensation to Pennsylvania claimants, issued certificates for the time being for said lots in trust for the proprietors of the townships, and the committees have from time to time sold a great part of said lands, but "as the committees were not vested with the legal titles, the sales and leases made by them are invalid," and the "rents and debts due to the respective proprietors * * * can not be recovered," etc. It was enacted that the leases, etc., made by the committees be confirmed as fully as if the committees had had the legal title at the time of making the leases; the act further provided for the election of trustees in the respective townships, who should have authority to purchase and hold lands to the use of the proprietors of the respective townships, and to sell and convey them in fee simple, or for less estate, etc., and that the interest in lands and debts belonging to the proprietors of the three townships should be vested in the trustees, etc. By act of April 14, 1835 (Pamph. L. 276), the provisions of this act were extended to "the township and proprietors of the township of Providence, one of the seventeen certified townships," etc. Joseph Fellows, the original lessee, died in 1835. The rents were duly paid to the committees of Providence township and the taxes up to 1815, and both since that time regularly from year to year.

The case was tried on the 13th of January, 1869, before Hon. John N. Conyngham, President of Luzerne Common Pleas, and at the close it was submitted to him on the evidence as a case stated in nature of a special verdict. Judge

Conyngham having died before rendering a decision, the case was, on the 13th of January, 1872, submitted in the same manner to Hon. William Elwell, P. J., of the 26th District, at a special court.

The plaintiff gave in evidence a certificate issued to James Abbott and John Taylor, public committee of the certified township of Providence, by the commissioners under the above mentioned acts of April 4, 1799, etc., for 50 acres, the land in dispute being parts of lots No. 9 and 10 of the said township of Providence, surveyed September 9, 1802, and returned January 2, 1804.

On the 17th of July, 1812, a patent from the commonwealth for 50 acres, parts of lots No. 9 and 10, the land in dispute, was issued to John Cary and John Taylor, town committee of Providence, and their successors, etc.

On the 13th of March, 1865, Henry Griffin and John Quinlan, trustees of Providence, conveyed the same land to Joseph W. Griffin, the plaintiff.

It was conceded at the trial that there were no opened mines on the premises at the date of the lease in 1796, nor until 1810, when the lessee opened a coal mine; that coal had been mined more or less by the lessee and those claiming under him ever since, and that since 1855, from 3,000 to 5,000 tons of coal have been mined and sold. Since 1855 the lessee and those claiming under him had erected valuable improvements for the purpose of mining, and prior to that they had made general improvements. Prior to the commencement of the suit nearly all the surface had been laid out in town lots. Stone quarries had been opened in 1855 and since, and stone in considerable quantities sold.

On the 22d day of August, 1865, Joseph Fellows, defendant, entered into articles of agreement to sell to Joseph J. Postens, another defendant, certain lots, parts of the land in dispute.

"Excepting and always reserving all the coal and other minerals beneath the surface of and belonging to said premises, with the exclusive right to the said Joseph Fellows, his representatives and assigns, to mine and remove the same by any subterranean process incident to the business of mining, and also to pass through the said premises by any

subterranean passages to mine and remove the coal from any adjacent lands, without the right, however, to enter upon the surface of said premises for any purpose whatever. The party of the second part agrees to purchase the said land subject to the above reservations and restrictions, and pay for the same, to the party of the first part, the sum of four thousand seven hundred and sixty dollars: * * * seven hundred dollars down, and the residue in ten equal installments, to be paid yearly, on the 23d day of August, with interest from the 23d day of August, 1865; and the interest shall be paid annually on the unpaid principal money. On the full payment of the said purchase money and interest, the party of the first part agrees to execute and deliver to the party of the second part a good and sufficient deed of the said land in fee simple, with covenant and warranty, reserving the coal and other minerals and privileges above stated, with a full and unconditional release and discharge forever on the part of the said party of the second part, his heirs and assigns, to the party of the first part, his heirs and assigns, from any liability for any injury that may result to the surface of the said premises from the mining and removal of the said coal and minerals; and with a quitclaim on the part of the party of the second part to the party of the first part, his heirs and assigns, all right, etc., to the said coal, and the privilege of mining and removing the same. * * * The purchase money may be paid by the said Joseph J. Postens at any time."

At same date \$4,000 was paid on the contract.

Joseph Fellows made a number of similar contracts with other parties for different lots, part of the same land.

The plaintiff's propositions were:

"1. Joseph Fellows, the elder, took an estate for a term of years, under the lease in this case, viz., for 999 years, and it does not amount to a freehold, it is inferior to it; an estate for a term of a thousand years is only a chattel, and is held to be personal estate, and this may expire during the continuance of the term by forfeiture." Co. Lit., 45, 46.

"2. Forfeiture of the estate taken in this case may result by reason of the tenants having conveyed a greater estate in the land than the law entitles him to make, *i. e.*, a greater estate in the land than he possessed: Coke on Littleton, 251;

Blackstone's *Commen.*, p. 274; Wood's *Institutes*, Book 2, Chapter IV, p. 289."

The reason for the above doctrine is, that the remainder or reversion is put in jeopardy; and it is but just that the estate should be forfeited and taken from him who has shown such a manifest and improper use of the estate devised.

A, holding a lease for a term of years, delivered up possession of the premises and lease, in fraud of his landlord, for the purpose of letting in hostile title. It was held a forfeiture of his title: *Ellerbrock v. Flynn*, Crompton, M. & R. *Exchequer Reports*, 137.

"3. Forfeitures may also arise, by reason of the tenants having committed waste of the lands leased to them."

The statute of Gloucester, 6 Edward I, chapter 5, is in force in Pennsylvania. Report of the Judges, Roberts' Digest of the British Statutes, pp. 46 and 426. He that is attainted of waste shall lose the thing which he hath wasted.

The act of 1833, section 3d, provides that quarrying and mining, and all such other acts as will do lasting injury to the premises, is waste: Pamp. L., p. 99, supplement to the act of 2d April, 1803; Smith's *Laws*, p. 89; Purdon's *Digest*, 1007, pl. 2.

A tenant can not open any new mines or quarries on the land without committing waste: *Coke upon Littleton*, 53. If the tenant digs for gravel, lime, clay, brick, earth, or stone hid in the ground, or for mines of metal, or coal, or the like, not being open at the time of the lease, it is waste: *Coke upon Littleton*, 53 (or *First Institutes*, 53); *Bainbridge on the Laws of Mines and Minerals*, p. 48, etc. When the owner of land makes a lease of the same, with all mines and minerals, if there be no open mines on the land the tenant shall not open or dig for mines or minerals; the meaning of inserting mines, minerals, trees, etc., was that all shall pass, but, as timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him. *Whitfield v. Bewit*, 2d Peere Williams' *Reports*, 240. If the waste is committed here and there throughout, all shall be recovered: Wood's *Institutes*, Book 2, Chapter IV, pp. 295, 296.

Judge ELWELL delivered the opinion of the Court of Common Pleas, May 13, 1872, as follows:

"The plaintiff seeks to recover, in this action, the possession of fifty acres of land, situate in that part of the city of Scranton which was formerly the borough of Hyde Park, in the certified township of Providence. His title was not much questioned upon the argument. For the purpose of this case, under the view which I take of the rights of the defendants as lessees under the legal title, it may be conceded that the title vested in the public committee of the township of Providence, by the certificate dated in 1807, granted by the commissioners appointed under the act offering compensation to Pennsylvania claimants of certain lands within the seventeen townships of Luzerne county, passed on the 4th April, 1799, and its supplement, together with the patent from the commonwealth, dated in 1812, became vested in the plaintiff by the deed from the majority of the trustees of said township, on the 13th day of March, 1865.

"Both parties in this controversy trace their rights back to what is called the 'Connecticut title.' The certificate granted to the public committee is, of itself, conclusive evidence that they, or those from whom they derived the title, were actual settlers prior to the decree of Trenton, in 1782.

"On the 8th September, 1796, the then public committee of the township of Providence executed and delivered to Joseph Fellows a lease of the land in question for the term of nine hundred and ninety-nine years, for the yearly rent of four pounds and four shillings and the taxes. The plaintiff now contends that this lease was, at the time of making it, absolutely void, and conferred no estate upon the lessee, and we are cited to the act of the 11th April, 1795, which forbids the taking of possession of any lands in Luzerne county under color of title not derived from the commonwealth or the late proprietors. But neither this act, nor that of 6th April, 1802, applied to lands within the seventeen townships.

"It is unnecessary to refer particularly to the several acts of assembly in reference to this subject. In 1814 (see 6 Laws Pennsylvania, 122), the legislature repealed the whole list of intrusion laws, acts to protect territorial limits, etc., and in

1813 so far recognized *some* rights of Connecticut claimants as to respect the law which suspended the act of limitation where lands were claimed under Connecticut. Prior to this time it was decided by the Supreme Court, in *Carkhuff v. Anderson*, 3 Binn. 4, that the interest of a Connecticut settler in land within the seventeen townships, who was entitled by the act of 1799 to obtain a patent, was subject to the lien of a judgment. This case in effect decides what was expressly held by Judge Scott, in *Barney v. Sutton*, 2 Watts, 31, to wit, that after-acquired title of a Connecticut settler by a certificate under the act, inured to the advantage of a purchaser, where the vendor had conveyed or executed a contract before acquiring the legal title.

"On the 8th day of April, 1826 (Pamphlet Laws, p. —), a law was passed, enacting 'that the relation of landlord and tenant shall exist, and be held as fully and effectually between *Connecticut* settlers, and between Connecticut settlers and Pennsylvania claimants, as between other citizens of the commonwealth, on the trial of any cause now pending or hereafter to be brought within the commonwealth, any law or usage to the contrary notwithstanding.'

"This act was held, in *Satterlee v. Mathewson*, 16 S. & R. 169, to be constitutional, and upon a writ of error to the Supreme Court of the United States, the decision was affirmed.

"But still more to the purpose, and directly in the line of the plaintiff's title, and without which he must have failed for want of authority in the committee or trustees to make a conveyance, is the act of 2d April, 1831 (Pamphlet Laws, 367), and the supplement thereto passed April 14, 1835, by which *all leases* before made by the committee of the proprietors of Providence township were *confirmed*, and declared valid.

"The objection to the lease on this ground is an ungracious one, coming as it does from a landlord who holds under or by virtue of the *same* act of assembly which confirmed the tenants' title, and who is presumed to have knowledge of the fact that for seventy years prior to his purchase the rent reserved had been paid to and received by his predecessors in the title. If there were no confirming act of assembly, there would arise, after this lapse of time, a presumption of confirmation by the lessor, by the acceptance of rent and the written receipt therefor.

"It is contended, *secondly*, by the counsel for the plaintiff, that the tenant has forfeited his term by having conveyed a greater estate in the land than he possessed.

"The facts, as stated, do not show any *conveyance* by the tenant. He entered into *articles of agreement* for the sale of a number of lots in August, 1835, and covenanted with the purchaser that, on the full payment of the purchase money (the last installment of which would fall due in 1875), he would execute and deliver to him a good and sufficient deed of the land, sold in fee simple, with covenant of warranty.

"The law of England upon the subject of forfeiture, the common law, does not go the length of declaring that even a *conveyance* by a tenant will in all cases work a forfeiture. In order to have this effect it must be such as displaces or divests the estate of the reversioner; if it have not that effect the law will not adjudge it a forfeiture. It must, therefore, be by *feoffment* and livery, for *this only* operates upon the possession, and effects a disseizin. It can not be by a grant or any *other* conveyance in the nature of a grant, such as lease and release, or bargain and sale; conveyances of this kind operating only on the grantor's interest, and passing *only* what he may lawfully part with: 5 Bac. Abr., 668; Title, Lease and Term for Years, Co. Litt. 251, 6; 1 Blk. Com. 274, n; 1 Chitty's Gen'l Prac. 243, 244, 287; 1 Bouvier's Law Dict. 602, and cases cited; 2 Blk. Com. 120, n.

"The reason for the distinction as to the effect of the different modes of conveyance is this: 'A feoffment may be a *tortious* conveyance creating a fee, even though made by the owner of a particular estate, and therefore incurring a forfeiture; but a lease and release form but an innocent conveyance, which transfers only such an interest as the party conveying has, and therefore may be used without forfeiting his estate.' 1 Chitty Gen. Prac. 327.

"In *McKee v. Pfout*, 3 Dall. 486, it was held by the Supreme Court of this State, and recognized as the law in numerous cases, that a conveyance by bargain and sale, acknowledged and recorded, of an estate in *fee simple* by tenant by the curtesy, was not a forfeiture of his estate, the reason being that a deed of bargain and sale operates by way of use, and conveys no greater estate than bargainor may lawfully convey;

therefore it never was considered as inducing a forfeiture on common law principles: Dunwoodie v. Reed, 3 S. & R. 445-454; 4 Kent's Com. 85, 454.

"If a *deed*, the ordinary mode of conveyance, can not work a forfeiture, surely a mere *agreement* to convey, which may or may not be carried out, will not have that effect.

"It is contended, lastly, by the counsel for the plaintiff, that the term is forfeited by reason of *waste*, committed by the tenant upon the demised premises, by opening mines thereon, by mining and selling annually large quantities of coal, and by opening and working, for the purpose of sale, stone quarries for a number of years before the commencement of this suit.

"It is an important fact in the case that there were no opened mines or quarries on the premises at the date of the lease; that mining of coal was first commenced by the tenant in 1810, and quarrying stone in 1855 or 1856.

"These acts were to the prejudice of the reversioner, and were undoubtedly waste, operating as a forfeiture of the term, and entitling the lessor to recover the premises by ejectment, unless they were authorized by the lease, or the forfeiture was by some act of his. This brings us to the consideration of the most important and difficult part of the case, involving the proper construction of the lease, and a determination of the rights of the parties under it.

"In the first or granting part of the indenture the lessors say that *they* have, and a majority of them *hath* granted, demised, set and to farm let, and by these presents do grant, demise, lease, set and to farm let, unto the said Joseph Fellows, his executors, administrators and assigns, all that certain tract of land (describing these several lots or tracts). Then follows this clause: 'To have and to hold the above demised premises, with every privilege, right, member and appurtenance whatsoever, to the same premises belonging or in anywise appertaining, whether ways, waters, watercourses, *mines and minerals* of whatever description, to the said Joseph Fellows, his executors, administrators or *assigns*, for and during and until the full end and term of nine hundred and ninety-nine years, fully to be complete and ended.'

"It is the office of the *habendum* clause in a deed to de-

termine what estate or interest is granted. It may lessen, enlarge, explain or qualify the estate granted in the premises: 2 Blk. Com. 298. Unless totally repugnant to the estate granted, the words of the *habendum* are to receive the same construction as if contained in the first part of the instrument. In *Wager v. Wager*, 1 S. & R. 375, it was said by Tilghman, C. J., that 'one of the most important rules in the construction of deeds is so to construe them that no part shall be rejected. The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part.' This rule, applied to the lease, relieves the mind from all doubt as to the meaning of the parties. When the lessors said that the lessee should have *every* privilege of mines and minerals, it was clearly their intention that he should reap some benefit and advantage from the exercise and enjoyment of that privilege. It never could have been contemplated that the tenant should forfeit all rights, if he made those expressly granted to him available. The *right* to the minerals being granted to him he might dig for them. It is a well settled rule that when anything is granted all the means to obtain it, and all the fruits and effects of it, are granted also, and all shall pass inclusive together with the thing, by the grant of the thing itself: Noy's Maxims, 198.

"If there be a lease of land with the mines in it, and there be no open mines, the lessee may dig for mines, *otherwise the grant as to the mines will not take effect*: *Saunders' Case*, 5 Rep. 12 A. B., 1 Inst. 54, b; *Liford's Case*, 11 Rep. 52; Co., Litt. 59 B; 1 W. Sand. 323, N. C.; 10 Bac. Abr. 427; 1 Wash. Real Prop. 412.

"The case of *Whitfield v. Bewit*, 2 Peere Wms. 240, is not in conflict with *Saunders' case*, nor with the general doctrine as stated above. *There* the grantor conveyed to *trustees* the fee simple of the lands, with all mines, etc., to his own use for life; remainder to A for life; remainder to his first son in tail, with other remainders stated; remainder to the grantor in fee. It was *held*, that being a tenant for life, A could not commit waste by opening mines, and that the words mines, trees, etc., were introduced, that all should pass to the trustees; but as they were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to them.

"The words used in conveying the fee to the trustees were the mere usual and formal words to convey a fee, and there was nothing to indicate that the tenant for life was to hold the property dispenishable of waste. It is very evident it was not the design of the lord chancellor to overrule *Saunders' case*, but to distinguish the case under consideration from that. The one was a conveyance of the fee to trustee to support remainders for life and in fee, while the other was a lease of a present interest to the lessee, in which the words used could have no operation or effect, unless the tenant was permitted to open and work the mines.

"In a lease designed merely for agricultural purposes there is no occasion to say anything in regard to the mines or minerals, where there are no open mines, unless it is intended to grant some interest therein. When they *are* mentioned, it must be considered that there was as a *purpose* in doing so, and when that purpose is plainly and expressly declared to be a *privilege*, a benefit to be enjoyed by the lessee, the case of *Whitfield v. Bewit* is not an authority against the exercise of the privilege granted.

"The term 'minerals' embraces everything not of the mere surface which is used for agricultural purposes; the granite of the mountain as well as metallic ones and fossils, are comprehended within it: *Earl of Rosse v. Wainman*, 14 M. & W. 859; Bainbridge on Mines 1, note 1.

"Having considered the case thus far on the effect of the words of the lease, let us for a moment examine it in the light of the conduct of the parties.

"It was said per Lord Hardwicke, in *Attorney General v. Parker*, 3 Atk. 576, 'that there is no better way of construing ancient grants and deeds than by usage.' And the uniform course of modern authorities fully establishes the rule that an ancient grant is to be construed by evidence of the manner in which the thing granted has always been possessed and used; for so the parties thereto must be supposed to have intended: *Weld v. Hornby*, 7 East, 199; *Rex v. Osbourne*, 4 East, 327.

"More than half a century before the bringing of this suit, the lessee and those claiming his title mined coal upon the demised premises. More than ten years before this suit brought, they made valuable improvements for the purpose

of mining coal, and annually mined, since 1855, from 3,000 to 5,000 tons.

"During all this period the lessors were annually, or from time to time, receiving the stipulated rent, without, so far as appears in the case, a word of complaint, either from the trustees or any inhabitant. It is true that it is not expressly stated that the trustees had notice of the opening of mines by the tenant; but after this great lapse of time and the notoriety which always attends the operations of mining coal, it may fairly be presumed and taken as *prima facie* evidence that not only the committee, but all the inhabitants of the township had full knowledge, as well of the acts of the tenant in mining as of the large amount expended in the way of improvements for the purpose of mining. Under these facts, if it were even doubtful whether the words 'every privilege to the premises belonging, whether mines or minerals, etc.,' were intended to give the right to dig for, mine and take away coal, the meaning of the parties is elucidated by the conduct which they have pursued. The right to mine coal, as claimed by the lessee, has been exercised since 1810, and fully acquiesced in by the lessor, by the receipt of the rent down to the first day of January, 1865.

"But I put the decision of the case upon higher ground than that of waiver of forfeiture, and *hold*, that upon the face of the lease there is granted the absolute right to take minerals from the land demised, and for that purpose to dig the soil and open mines. When a lease permits the opening of mines, it is not waste for the tenant to work them, even to exhaustion: Per READ, J., *Kier v. Peterson*, 5 Wright, 361.

"The conclusions at which I have arrived in this case may be summed up and briefly stated as follows:

"1st. That Joseph W. Griffin, the plaintiff, at the commencement of this suit held the legal title to the land in question by virtue of a deed from two of the trustees of the public land of the certified township of Providence.

"2d. That the lease by the public committee of said township, made on the 8th day of September, 1796, to Joseph Fellows, for the term of nine hundred and ninety-nine years, for the rent of four pounds and four shillings annually, is a valid and binding instrument, and the conveyance of the legal title

to the plaintiff was subject to all the rights of the defendants as assignees holding under that lease.

"3d. The articles of agreement entered into by Joseph Fellows, the present holder of the leasehold interest, to sell and convey in fee simple certain lots to Joseph J. Postens, W. B. Carling, and others, did not operate as a forfeiture of the term. If he had conveyed by *deed*, the only effect would have been to convey the residue of the term for years, and therefore no injury to the reversioner.

"4th. By the *terms* of the lease, as well as by the construction given to it by the acts of the parties for more than fifty years before the plaintiff acquired his title, the lessee and his assigns have the right to mine coal and quarry stone for the purpose of sale.

"5th. Upon the whole case, the defendants holding as assignee of the original lessee have the right of possession as against the plaintiff; therefore,

"Now, May 13, 1872, *judgment for the defendants* upon the case stated, with costs."

The plaintiff took a writ of error and assigned for error, and entering of judgment for the defendants.

D. H. RANDALL, for plaintiff in error. The lease was for agricultural purposes, as appears by the premises; the *habendum* can not give anything that is not in the premises, but may enlarge, abridge or qualify them: 14 Vin. Ab. 145. The construction should be that most agreeable to the intent of the grantor: *Dormer v. Packhurst*, 3 Atk. 135; *Wager v. Wager*, 1 S. & R. 375. The restriction as to wood shows that woodland was not included in the lease: *Greber v. Kleckner*, 2 Barr, 289. If the lessee opened mines he would be liable to an action of waste; if a stranger, the tenant could maintain trespass: 1 Washb. Real Prop., 3d Ed., 411. Lessee could not open new mines: *Astry v. Ballard*, 1 Freeman, 444; *Saunders' Case*, 5 Rep. 12; *Darcy v. Askwith*, Hobart, 234; *Whitfield v. Bewit*, 2 P. Wms. 240. If a lessee for years conveys in fee he occasions a forfeiture: Woodfall, Landlord & Tenant, 150; Smith, Landlord & Tenant, 283; *Willison v. Watkins*, 3 Peters, 48; *Stump v. Findlay*, 2 Rawle, 168; Coke Litt. 233, b.

A. RICKETTS and A. T. McCLINTOCK, for defendants in error. The *habendum*, if not repugnant to the estate granted, must receive the same construction as if in the first part of the instrument: *Wager v. Wager*, 1 S. & R. 374; *Ongley v. Chambers*, 1 Bingham, 483; *Norton v. Webster*, 12 Adolph. & Ell. 442. The lease gives "every privilege, etc., pertaining to mines and minerals;" this gives lessee the right to work mines: *Saunders' Case*, 5 Rep. 12a; 10 Bac. Ab. 427; 1 Washb. Real Prop. 318, 411, 412; *Clegg v. Rowland*, Law Rep., 2 Eq. Cases, 160; Co. Litt. 546; 7 Comyn's Dig. 667; "Waste," D. 4. "Mineral" covers right to quarry stone: *Rosse v. Wainman*, 14 M. & W. 859; Bainbridge on Mines 1, note 1. Open mines may be worked to exhaustion: *Kier v. Peterson*, 5 Wright, 361. A tenant for years, unless restrained by covenants, may underlet or carve the estate into such forms as he pleases: 1 Washb. Real Prop. 442, 450. A grant of a larger estate than the grantor has passes only the estate the grantor had: *Dunwoodie v. Reed*, 3 S. & R. 445; *McKee v. Pfout*, 3 Dall. 486; *Rohr v. Kindt*, 3 W. & S. 566; *George v. Morgan*, 4 Harris, 108; *Bennett v. Morris*, 5 Rawle, 16; *Desilver's Est.* 5 Id. 111; *Sharp v. Thompson*, 1 Wharton, 153; 4 Comyn's Dig. 305, "Forfeiture," A. 3. A grantee can claim no larger estate than his grantor had: 4 Comyn's Dig. 395, note O; 3 Bac. Abr. 465; 2 Thomas' Co. L. 134; *Smith v. Clyfford*, 1 T. R. 738.

Judgment was entered in the Supreme Court, March 17, 1873.

PER CURIAM.—Judgment affirmed on the opinion of Judge Elwell.

WALKER ET AL. V. TUCKER ET AL.

(70 Illinois, 527. Supreme Court, 1873.)

Clear contract does not admit of construction. In construing contracts where the language is ambiguous, courts endeavor to ascertain the intention, and to give effect to that intention; but where the language is unambiguous, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced.

By the demise of farming lands a covenant is raised that they shall be used as such, and other covenants are implied as to waste and good husbandry.

Use of recitals in construction. The recitals preceding the operative words may be used to reach the intention when the operative words are of doubtful meaning, but they can not control the operative part where it is clear and unambiguous.

Idem. Recitals which do not express all that is included, in the operative part of an instrument can not be held to be a full and clear expression of the intention of the parties.

¹ Distinction between inability of contractor to perform and inherent impossibility of performance. Where the contract is to do a thing possible in itself, the promisor will be liable for a breach, notwithstanding performance was beyond his power; but when from the nature of the covenant it is apparent that parties contracted on the basis of the continued existence of a person or thing, a condition is implied that the perishing of the person or thing shall excuse the performance.

Application of the distinction to exhausted coal mine. The lessee of coal mines, covenanting to work the same in a good and minerlike manner, is excused from further performance when the coal mines become exhausted.

² Exhaust of mine, a question of fact. Whether a coal mine is exhausted or not is a question of fact to be determined by the jury, and evidence of usage or custom is admissible to enlighten them.

³ Construction of lease for joint farming and mining. Where an agreement in its recitals stated that, whereas, etc., the parties of the first part are desirous to lease and convey the right of mining, and in the granting clause the demise was of the said "farming lands," "together with the right to mine," and "together with the enjoyment of so much of the surface of said lands," as might be necessary to carry on the mining, it was held, that the right to the farming land was as definite as the right to mine.

Eviction in such case. Where the lessee under a lease allowing him both to farm and to mine, is prevented from exercising the right to farm, it is an eviction, and such eviction is a good plea to an action for breach of the covenants of the lease.

Appeal from the Circuit Court of Cook County; the Hon. LAMBERT TREE, Judge, presiding.

Mr. JOHN N. JEWETT and Mr. CHARLES T. ADAMS, for the appellants.

Mr. JOHN VAN ARMAN, for the appellees.

¹ *Gowan v. Christie*, 8 M. R. 688.

² Practical, not complete exhaustion, required: *N. Y. Co. v. Stephens*, 5 Lea, 468; see *Tod v. Stambaugh*, 37 Ohio St. 520.

³ *Raine v. Alderson*, 4 Bing. N. C. 702.

Mr. Justice SCHOLFIELD delivered the opinion of the court.

This action is brought to recover for breaches of the covenant contained in the following instrument:

"*Memorandum of an agreement*, made and concluded this 15th day of July, A. D. 1865, by and between Chauncey Tucker and Henry Tucker, by Thomas Brown, their attorney in fact, and Thomas Brown of the city of Buffalo and State of New York (partners under the name, style and firm of Tucker, Brown & Co.), parties of the first part, and M. O. Walker, Jas. Mullins, G. H. Cutting, Amos G. Throop and R. McClelland, of the city of Chicago, in the State of Illinois, composing the Carbon Hill Coal Company of Ohio, parties of the second part.

"Witnesseth, that whereas the said parties of the first part are lessees from Jonathan Ledyard, Cazenovia, Madison county, New York, of certain lands lying near the village of Palestine, in the county of Columbiana and State of Ohio, which said lands are more particularly described in a certain article of agreement and lease, made by Ledyard to Chauncey Tucker and Henry C. Tucker, of Buffalo, dated the 2d day of February, 1863, and also an amendment made thereto by the said Jonathan Ledyard, to and with the parties of the first part, above named, bearing date of 5th day of July, 1865, both which lease and amendment thereto are to be of record in said Columbiana county, Ohio, and to which reference is hereby made for the description of the premises herein and hereby referred to and leased. And whereas, the said Tucker, Brown & Co., parties of the first part, are desirous to lease and convey to the said parties of the second part the right of mining for and excavating coal on the said premises during the continuance of said lease and amendment thereto, made by said Ledyard,

"Now, therefore, in consideration of the covenants, conditions, stipulations and rents to be hereafter fulfilled, kept, done, performed and paid by the said parties of the second part, their executors, administrators and assigns, the said parties of the first part do hereby demise and lease unto the said parties of the second part, their executors, administrators or assigns, the farming lands described and mentioned in the said articles of agreement with and lease from said Ledyard.

yard, together with the right to mine, dig, extract and carry away coal from the said premises described in Ledyard's lease and amendment thereto, or any part thereof, together with use, enjoyment and occupation of so much of the surface of said lands as may be necessary to carry on or conduct the mining for coal on said premises, or any part thereof, and also to take, dig and extract from said premises thirty thousand tons of coal per annum, and, if possible, sixty thousand tons of coal, or over, for and during ten years from the 15th day of July, 1865, with the privilege of, on the part of the said parties of the second part, to have this lease and agreement extended eight years further, paying for the coal during said last eight years at the rate of forty-five cents per ton; and also that the said parties of the second part are to have the use and enjoyment of forty good cars, now at the said coal mines, the said premises, together with all the houses, barn by the chute, blacksmith shops and tools, and all other property and fixtures connected with the working of these coal mines now on the premises, except only the house on the hill, now occupied by Tucker's tenant; and also the right to have and take from said premises all necessary timber for the use and working of said mines, to be selected from such portion of the premises as the said parties of the first part may designate; and also shall purchase from said parties of the first part all the live stock on the said premises, at prices to be mutually agreed upon by the parties hereto, and in case of disagreement then a disinterested third person shall fix the value thereof.

“And it is further covenanted and agreed that the said parties of the second part shall further have, during the further continuance of this lease and agreement, the sole and exclusive right to open and work the vein of cannel coal on said premises, during the continuance of this lease, at fifteen cents per ton, and to have the privilege of erecting buildings for storage and manufacturing purposes, joining said mines; and that, in case of the rebuilding of the trestle work on said premises, or a strike of the miners for more than two months, then the time so used in building said trestle work, or in the strike of the miners, shall be deducted from this lease, and the same shall be extended for an equal period thereafter.

“And the said parties of the first part do further hereby

covenant and agree to and with the said parties of the second part that they have the lawful right to make this lease; that said leasehold premises and said personal property are now free and clear from all incumbrances, rents or liens, of every name, nature and kind, and that they will forever warrant and defend the quiet and peaceable possession of the said parties of the second part during the continuance of this lease; and the parties of the first part agree to perform all the covenants and agreements by them to be kept and performed in and by said agreement with and lease from said Ledyard, and fully uphold the estate of said parties of the first part herein, under said lease from said Ledyard.

“And the said parties of the second part do hereby covenant and agree to and with the said parties of the first part, their executors, administrators and assigns, to work the said coal mine, during the continuance of this lease and agreement, in a good and workmanlike manner; to take the necessary timber therefor from such portions of the premises only as the said parties of the first part shall designate; to pay the said parties of the first part, for all coal so taken out during the first ten years, the sum of thirty-five cents per ton, and for cannel coal fifteen cents per ton; payments to be made monthly, at the Bank of North America, in New York, with current rate of exchange, not exceeding one fourth of one per cent., and for the remaining eight years at forty-five cents per ton, and fifteen cents for cannel coal; and also will return to the said parties of the first part, at the termination of this lease, the forty cars, and also all the barns, shops, tools, and other personal property on said premises, in the same good order and condition as they are received by them, ordinary wear and tear or inevitable accident excepted; and that they will purchase all the live stock on said premises at prices to be agreed upon between the parties hereto; and in case they can not agree as to their price and value, then they will agree to select some disinterested third person to fix and appraise the value thereof.”

Appellants claim that, by the terms of this instrument, they are entitled to the possession and use of the farming lands, in addition to the right to mine for coal during the term. The court below held otherwise, and this presents the first question requiring our attention.

In the construction of a contract, where the language is ambiguous, courts uniformly endeavor to ascertain the intention of the parties and to give effect to that intention; but where the language is unambiguous, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced: *Benjamin v. McConnel*, 4 Gilm. 536; *Smith v. Brown*, 5 Id. 309; *Crabtree v. Hagenbaugh*, 25 Ill. 214. The language here employed to describe what is demised is plain and easily understood, and, taken by itself, is free from any ambiguity. It is: "*the farming lands described and mentioned in the said articles of agreement with and lease from said Ledyard, together with the right to mine, dig, extract and carry away coal from the said premises described in Ledyard's lease and amendment thereto, or any part thereof, together with the use, enjoyment and occupation of so much of the surface of said lands as may be necessary to carry on or conduct the mining for coal on said premises,*" etc.

The right to the farming lands thus appears to be as definite and certain as the right to mine for coal; nor does it appear that it was granted as a mere incident or accessory to that right, for the right to mine for coal is expressly declared to be "together with," that is, in addition to the demise of the farming lands, and the right to such incidental use and occupation of the surface as may be necessary for the purposes of mining is conferred by an additional distinct clause.

It is true, in construing an instrument of this character it must be considered with reference to its object and the whole of its terms; still, when by the use of general words the intention is clearly and unequivocally expressed, the court is bound by it, however capricious it may be, unless it be plainly controlled by other parts of the instrument: 1 Chitty on Contrs. (11 Am. Ed.) 122.

The circumstance that no separate rent is stipulated to be paid for the use of the farming lands by appellants, while appellees were required, as is argued, to pay to Ledyard \$500 per annum for their use, proves nothing. The \$500 required to be paid by appellees to Ledyard was not for the use of the farming lands alone, but also for the buildings and fixtures thereon, a portion of which at least it is admitted are demised

to appellants by this instrument whether the farming lands are or not. Appellees, too, by that lease, are authorized to build certain houses for the use of miners, repaying themselves therefor by certain coal rents, and are required to pay as rent for the use of such houses at the rate of ten per cent. per annum on cost; yet there is no corresponding provision in this instrument, either in reference to the building of such houses or the payment of rent for such as may have been built pursuant to this stipulation. Appellees are only required to pay Ledyard ten cents per ton for coal, for which by this instrument appellants are required to pay appellees forty-five cents per ton. This margin certainly affords an adequate consideration for the rent of the farming lands and the use of the buildings; and from the language of the instrument it is clear, beyond doubt, that the forty-five cents per ton to be paid on the coal was not understood as being compensation merely for the privilege to mine for coal, for it is expressly said, "that in consideration of the covenants, conditions, stipulations and rents to be hereinafter fulfilled, kept, done, performed and paid by the said parties of the second part, etc., the said parties of the first part do hereby demise and lease unto the said parties of the second part," etc., the "farming lands," etc. It is an entire, indivisible contract, as much so as in the sale of a farm with the crops, farming implements and live stock thereon, for a specified sum of money for the whole. Nor are we able to perceive any special significance in the fact that there are no covenants with regard to the care and cultivation of the farming lands. By the demise of the farming lands a covenant is raised, by implication of law, that they shall be used as such (Platt on Covenants, 55; *De Forest v. Byrne*, 1 Hilton, 44); and in the absence of express covenants in reference thereto, the law also implies covenants on the part of the lessee that no waste shall be committed; that the lands shall be farmed in a husbandlike manner; that the soil shall not be unnecessarily exhausted by negligent or improper tillage, and that repairs shall be made: Taylor's Landlord and Tenant, Sec. 344.

The performance of these covenants would seem to sufficiently protect appellees against liability to Ledyard on account of the farming lands, except as to the stipulated rent; and

there is therefore nothing improbable in supposing they apprehended no necessity for special covenants in these respects.

We are unable to discover why it should be presumed that appellants were less desirous of having the use of the farming lands, in connection with the right to mine for coal, than appellees were, when they obtained their lease from Ledyard. In both the lease from Ledyard to appellees and that from appellees to appellants, the paramount object is undoubtedly the right to mine for coal; yet it may also have been desirable to the lessees to have, at the same time, the use of the farming lands. This would avoid all possible conflict that might otherwise arise between the lessees of the different rights; and we are, moreover, unable to say, from any information with which we have been favored on the subject, that the use of the farming lands might not, in other respects, contribute materially to the convenience and profit of the lessees while conducting their mining operations. It seems, at least, quite as unreasonable, under the circumstances, to suppose that appellees should have desired to retain as that appellants should have wished to acquire this right.

It is also insisted that the fact that appellees reserve the right to direct from what portion of the premises the appellants should take wood during the term, shows it was not understood that they had parted with their control over the farming lands. This inference is by no means necessary.

In the lease from Ledyard to appellees, it is provided, "timber may be cut on the farm for mining uses, and for necessary firewood, and repairs and improvements on the premises, but the party of the first part may direct from what place it shall be taken." To enable appellees, therefore, to comply with this, it was indispensable that they retain the right to direct from what part of the premises appellants should take wood during the term. A further objection urged is, that if the right to the use and occupation of the farming lands was granted to appellants, then all the interest appellees had in the premises was gone; and that appellees having retained no reversionary interest in the premises, this, instead of having been a subletting, would have been an assignment of appellees term, but that the language used shows that it was not the intention of the parties to assign an unexpired term, but

merely to sublet an interest in the term which appellees held, and the understanding must, therefore, have been that appellees still retained the farming lands.

This objection is not well founded. It is not pretended that the lease by appellees to appellants covered the entire interest or estate leased by Ledyard to appellees. The house occupied by Tucker's tenant is expressly reserved by appellees. Besides this, appellees reserve the right to direct from what part of the premises wood shall be cut, and appellants are required, at the expiration of the term, to return to appellees "the forty cars, and also the barns, shops, tools and other personal property on said premises," etc.

If, however, we were to concede that the transfer by a lessee of the unexpired term of a part of the premises held by him constitutes an assignment, instead of a subletting, the principle, when applied to the facts before us, does not sustain the position contended for. The whole of the unexpired term for mining is admitted to be transferred; and it is not nor can it be claimed that the right to the occupation and use of the farming lands is a reversionary right, to take effect only upon the expiration of the term for mining. It exists *in presenti*, and is totally disconnected from the right to mine.

But it is finally claimed that it is conclusively shown, by the recitals preceding the operative part of the instrument, that it was only the intention of the parties to convey the right to mine for coal. It is true, this is the only purpose therein expressed, yet it is equally true that this falls short of expressing all that was in fact conveyed. By the operative part of the instrument, as has been seen, it is expressly said that there is demised and leased "the use and enjoyment of forty good cars, now at the said coal mines, together with all the houses, barn by the chute, blacksmith shops and tools, and all other property and fixtures connected with the working of these coal mines," and the appellants were also thereby obligated to purchase of appellees "all the live stock on the said premises," etc. It is not pretended that these words are inoperative, and that appellants acquired through them nothing but the right to mine for coal; nor can it be said that this property would have passed to appellants, as an incident to

the right to mine for coal, had the language quoted not been used.

Unquestionably this property was deemed valuable and important in connection with working the mines, nevertheless it was not indispensable. The mines might have been worked without it. Even if property of this kind had been indispensable to successfully working the mines, still this particular property could not have been, for it is evident from the description that its place could have been supplied from other sources.

Inasmuch, then, as the recitals do not express all that is included in the operative part of the instrument, it is impossible that they should be held to be a full and clear expression of the intentions of the parties. The omission of the farming lands can be no more significant than the omission of the blacksmith shops and tools, and live stock.

The rule of law applicable is, where the words in the operative part of an instrument are of doubtful meaning, the recitals may be used as a test to discover the intention of the parties, and fix the true meaning of those words; but where the words in the operative part of the instrument are clear and unambiguous, they can not be controlled by the recitals: 1 Chitty on Confs. (11 Am. Ed.) 120-1; *Walsh v. Trevanion*, 15 Q. B. 733.

We do not perceive any necessary repugnancy between the provision granting the farming lands and the one granting the use, enjoyment and occupation of so much of the surface of the lands, in which the right to mine is granted, as "shall be necessary to carry on or conduct the mining for coal on said premises," etc. The former does not include the latter. They must be construed together, so that all the words shall have some effect given to them if possible. It would seem to be obvious, then, that the intention was that the use of the farming lands should be limited by the right to use the surface of so much of them as should be necessary to carry on or conduct the mining for coal.

If the whole surface of the farming lands had been absolutely and unconditionally granted, to be used for carrying on and conducting mining for coal, the objection might have been tenable; but in that event, appellees would have had

no more right to withhold the possession of the farming lands from appellants than if they had been conveyed as farming lands, for their possession would have been as essential to the enjoyment of the right in the one case as in the other.

We do not, upon the whole, feel authorized to place any other construction upon the operative words of this instrument than what, to our apprehension, they plainly and unequivocally import. We are not to presume that unambiguous and appropriate language to express one thing, was used to express something entirely different, or nothing at all. If it be true that this language was inserted by inadvertence, or through misapprehension, and it does not express the real intention of the parties, the remedy is in equity, by bill to reform the instrument. It can not be reformed in this proceeding.

We can not concur in the construction given by the circuit court, but must hold that the right to the possession and use of the farming lands is given to appellants, in addition to the right to mine for coal.

The 2d, 3d, 4th and 5th pleas of appellants were as follows:

"2. Said defendants say *actio non*, etc., because they say plaintiffs, after the making of the said demise in the said declaration mentioned, and before the happening of any of the supposed breaches of covenant in declaration assigned, to-wit, on July 15, 1865, at to wit, the county and State aforesaid, with force and arms, etc., wrongfully and unlawfully withheld from possession of said defendants, and Mullins and Cutting, deceased, the surface of the farming lands, parcel of the said demised premises in declaration alleged to have been demised, and refused to let defendants, and Mullins and Cutting into their possession thereof, and have from thence hitherto, though often requested to deliver up to them the possession thereof, withheld from them the possession of the surface of the farming lands, parcel, etc., and have refused to let them into the possession thereof, etc.

"3. Said defendants say *actio non*, etc., because they say plaintiffs, after the making of the demise in declaration mentioned, and before the happening of any of the supposed breaches assigned, to wit, on July 15, 1865, at county and State aforesaid, with force and arms, etc., entered into and

upon the surface of the said demised premises in the said declaration alleged to have been demised, in and upon the possession of defendants, and Mullins and Cutting, and ejected, expelled, put out, evicted and amoved, and kept them so ejected, etc., from the possession thereof, from thence hitherto, etc.

"4. Said defendants say *actio non*, etc., because they say that plaintiffs, after the making of said demise, and before any alleged breaches, on, to wit: July 15, 1865, at county and State aforesaid, with force and arms, etc., wrongfully and unlawfully withheld from said defendants and Mullins and Cutting a large portion of the said demised premises, to wit, five hundred acres or the land in the articles of agreement demised, and refused to let them into possession thereof, and from thence hitherto, although often requested, etc., wrongfully and unlawfully withheld from them said large portion of said demised premises, to wit, five hundred acres of the land in the said articles of agreement demised, and have refused to let them into possession thereof, etc.

"5. Said defendants say *actio non*, etc., because they say that plaintiffs, after making of said demise in declaration mentioned, on, to wit, July 15, 1865, at, to wit, county and State aforesaid, with force and arms, etc., wrongfully and unlawfully withheld from possession of defendants and Mullins and Cutting a large portion of demised premises, to wit, five hundred acres of the land in said articles of agreement demised, and refused to let them into the possession thereof, and have from thence hitherto, with force and arms, wrongfully, etc., withheld from the possession thereof, and refused to let into the possession thereof, though often requested, etc., said defendants and Mullins and Cutting; and said defendants aver that annual rental value of that portion of the demised premises so withheld, as aforesaid, was and is the sum of, to wit, \$50,000, amounting, from July 15, 1865, to commencement of this suit, to, to wit, \$350,000; in which said sum plaintiffs were, at the time of commencement of this suit, and still are, indebted to defendants and Mullins, survivors of Cutting, for the use and occupation of the portion of the demised premises so withheld, as aforesaid, which sum exceeds the damages sustained by plaintiffs for supposed breaches of covenant assigned, and said defendants offer to set off, etc."

The court below sustained demurrers to each of these pleas.

Construing the instrument upon which suit is brought, as we do, as conveying the farming lands connected with the demised premises to appellants during the entire term, it is impossible to sustain this ruling.

In *Smith v. Wise*, 58 Ill. 141, suit was brought to cover the amount of monthly rent claimed to be due for certain premises which had been leased by the plaintiffs to the defendants. The defense was, that, before the expiration of the term for which the premises were leased, the plaintiffs had, without the consent of the defendants, taken possession of a large part of them, thereby virtually evicting them. The evidence tended to establish that fact, and the court gave to the jury, among others, the following instructions:

"The principle upon which a tenant is required to pay rent, is the beneficial enjoyment of the premises, unmolested in any way by the landlord; and if the jury believe, from the evidence in this suit, that the plaintiff took possession of any part of the premises leased by her to the defendants, against their consent, then, in law, it is an eviction, and releases the defendants from the payment of any more rent, and they will find for the defendants."

"Although the jury may believe from the evidence that the defendants have never been disturbed in or evicted from the main building on the leased premises, and that they have had the use and enjoyment of the same, still, if they further believe from the evidence that the plaintiff has taken possession of any material part of said demised premises without the consent of the defendants, then the law is, it is an eviction, and the defendants are not bound to pay any rent for the part of the said premises they used and occupied, and the jury will find for the defendants."

These instructions were held to be correct, and in harmony with the previous decisions of this court.

Subsequently, in *Hayner v. Smith*, 63 Ill. 430, it was said, that on further reflection and a closer examination of the authorities, the instructions above quoted required some modification; and it is then added: "As was said by the court of common pleas, by Jervis, Lord Chief Justice, in *Upton v. Townend*, 17 Com. B. 30, and *Same v. Greenlees*, Id., it is

extremely difficult at the present day to define, with technical accuracy, what is an eviction. The word 'eviction' was formerly used to denote an expulsion by the operation of a title paramount, and by process of law. But that sort of an eviction is not necessary to constitute a suspension of the rent, because it is now well settled, if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion." This eminent judge further says: "I think it may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." It is also further added, quoting from Williams, Justice, in the same case in which the opinion quoted from Jervis was given, "There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises, which do not amount to an eviction, but which may be either acts of trespass or eviction, according to the intention with which they were done. If those acts amount to a clear indication of intention, on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction." And the court below was directed to instruct the jury upon the further trial of the case, in conformity with these views.

The gist of the defense presented by these pleas is, that the tenants were, by the willful and tortious acts of the landlords, deprived of the use of a part of the premises from the commencement of the term. There is no room for doubt as to the character of the act or the intent of the landlords. The facts alleged are clearly within the principles announced in *Hayner v. Smith, supra*, and the court below erred in sustaining the demurrers.

The next point urged by appellants is, that the court below erred in sustaining the demurrer to their 16th plea. The defense attempted to be set up by that plea is in answer to the 6th breach of covenant alleged in the declaration. The substance of that breach is, that appellants, on the 15th day of September, 1871, suspended their mining operations upon the

demised premises, and abandoned the working of the mines, etc.

The plea alleges that "On the said 15th day of September, 1871, the mines became and were wholly exhausted and incapable of yielding, when worked in a good and workmanlike manner, and with reasonable skill, care, diligence and energy, sufficient coal to pay for working said mines," etc. If the plea had stopped short after alleging that the mines became and were wholly exhausted, it would have been good, but the subsequent qualification shows that these words do not mean exhausted of coal, but only exhausted of such coal as was capable of yielding "when worked in a good and workmanlike manner, and with reasonable skill, care, diligence and energy, sufficient coal to pay for working said mines." This might be, and yet the most valuable portion of the mine remain untouched. It might be the result of the peculiar state of the market, and in nowise attributable to the difficulties to be encountered in mining; but, from whatever cause the result, it is a sufficient answer that the courts must enforce contracts as the parties make them. They can not superadd conditions or restrictions which the parties have not themselves thought fit to impose in making their contract. There is nothing in this instrument which authorizes a suspension or abandonment of mining because it has become unprofitable. As the case must be reversed for the error in sustaining the demurrer to the 2d, 3rd, 4th and 5th pleas of the appellants, it is unnecessary to express any opinion as to the weight or preponderance of the evidence, and, so far as the questions arising upon the giving and refusing of instructions are concerned, we deem it sufficient to indicate, in general terms, our opinion upon the law applicable to the case as presented on the trial in the court below, without critically examining the phraseology of each instruction given and refused.

The appellants are expressly bound by their covenant, "to work the said coal mine during the continuance of this lease and agreement in a good and workmanlike manner." It was incumbent on appellants to know, and the presumption is they did know, when they made this covenant, the difficulties to be encountered in performing it. It is elementary law

that when the contract is to do a thing which is possible in itself, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract: 1 Chitty on Contrs. 11 Am. Ed. 1074.

But where, from the nature of the covenant, it is apparent the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that if the performance became impossible, from the perishing of the person or thing, that shall excuse such performance. *Id.* 1076.

If, therefore, the coal mine was exhausted, the appellants were excused from further working it.

Whether a coal mine is exhausted or not is a question of fact to be determined by the jury from the evidence, and, in determining this question, since the parties are always supposed, in entering into a contract, to have reference to the known usage and custom which enters into and governs the business or subject to which it relates, it would be proper to hear evidence of any known usage or custom relating to this question, and showing when a mine is deemed exhausted. There is nothing in this lease which shows that the coal to be mined was to be adapted to the demands of any particular market, or that it should be of any peculiar quality, other than what is described by the words, "bituminous coal," and "cannel coal," and the law does not allow the court to presume the existence of conditions or qualifications in this respect.

We perceive no necessity for noticing any other questions presented by the record.

The judgment of the court below is reversed and the cause remanded, with directions to that court to overrule the demurrers to the 2d, 3rd, 4th and 5th pleas of the appellants, and allow appellees to plead over.

Judgment reversed.

Mr. Justice McALLISTER, having been of counsel, took no part in the decision of this case.

GOWAN V. CHRISTIE.

(Law Reports, 2 Scotch Appeals, 273, 5 Moak. 114. 1873.)

¹ **Failure of minerals demised.** Where the thing let turns out to be a nonentity, the lessee is not bound.

PER THE LORD CHANCELLOR: In such a case it is perfectly reasonable that the lease should be subject to reduction.

PER LORD CHELMSFORD: Where there is a total destruction or exhaustion of the subject-matter of a lease, the lessee is entitled to abandon it.

² **Perils of the adventurer.** The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all risk of its failure both as to quantity and value, unless either is warranted.

"Unworkability to profit" at common law affords no ground for reducing or throwing up a lease of minerals which are in their nature subject to many vicissitudes. There is no warranty in such case to the lessee.

Dissimilarity of mining and farming leases. A mining lease is practically a sale of a portion of the land: *dicta*, therefore, applicable to agricultural leases, are not always applicable to leases of minerals.

The question in this case turned on the obligations of a mineral lease; the tenant under it urging that, by reason of the sterility or exhaustion of the subject-matter, he ought to be discharged from his contract, as the premises, he alleged, were unworkable to profit, even though no rent should be exacted.

The appellant commenced his action in May, 1870, for reduction of this lease, which had been granted to him in February, 1866, "of the freestone and minerals and all materials and substances, of what nature soever, lying in and under certain lands" (in the pleadings specified), "with power to search for, work, win and carry away the said materials and substances," at a rent of £200 per annum, the lease being for twenty-one years; but with a stipulation that no rent should be exacted for the first year, and with power to the lessee at the end of the third, seventh and fourteenth years, to determine and put an end to the lease.

The grantor of this lease was the late Mr. Alexander Christie, of Baberton, who on his death, in August, 1868, was succeeded by his brother, as heir of entail of the estate. The

¹ *Walker v. Tucker*, 8 M. R. 673; *Bute v. Thompson*, 8 M. R. 371; *Jones v. Shears*, 8 M. R. 333.

² *Prendergast v. Turton*, 8 M. R. 167.

suit, therefore, was directed against the brother, and also against the widow of the deceased, as his sole representative in movables, and also in heritage, other than the entailed estate.

The appellant's condescendence stated that he had been induced to accept the lease by the recominendatory descriptions of the grantor, his agents, and factor, to the effect that it was thoroughly capable of being worked to profit. In February, 1870, the appellant took possession, and commenced his operations "by boring and otherwise;" but, according to the condescendence, he soon discovered that there was "no freestone, or other mineral, or material in the lands, capable of being worked to profit."

The respondents, on the other hand, denied the appellant's allegations, and insisted that "the freestone in the said lands was workable to profit."

The lord ordinary (Lord Mackenzie) found that the appellant's assertions of misrepresentation were not sufficient in law to support the conclusions for reduction of the lease. But as to the allegations respecting "unworkability to profit," his lordship allowed a proof, adding the following explanatory note:

The pursuer avers that he entered into the lease under essential error induced by the representations of the late proprietor of Baberton and of his agents and factor. These representations, it is said, were to the effect that there was a large stratum of freestone in the lands of Baberton proposed to be let, that it was of superior quality, and that it was capable of being worked to a profit by a tenant. It is not averred that the representations were false and fraudulent. The pursuer's statement is only that there is "no such amount of freestone as was represented to him." The capability of the freestone of being worked to profit depends on many contingencies. It is averred by the pursuer that he was not, at Candlemas, 1869, that is, after three years' possession and trial of the freestone, satisfied that there was no such freestone in the lands as had been represented to him, and that he accordingly did not avail himself of the break in the lease at that term, but continued his operations, although the next break did not occur until Candlemas, 1873. The present ac-

tion was not raised until fifteen months thereafter, that is, until after the pursuer had been upward of four years in possession of and working the subject of the lease.

The respondents reclaimed to the Inner House (first division), and the appellant obtained leave to amend his pleading, by adding to the words "capable of being worked to a profit in a mineral lease," the words, "even if no rent were to be paid."

The Inner House (first division) recalled the lord ordinary's interlocutor, whereby he had allowed evidence to be gone into as to the allegation of "unworkability to profit," the Inner House holding that there was no legal relevancy in the appellant's averments, and that they were wholly insufficient to justify the prayer of his summons. Court of Sessions decisions, 3d series, Vol. 9, p. 485. Against this judgment the present appeal was tendered to the House of Lords; Mr. PEARSON, Q. C., and Mr. TAYLOR INNES, of the Scotch bar, being of counsel for the appellant. Their argument, and the authorities cited, are fully dealt with in the opinions of the law peers.

The Solicitor-General, Sir GEORGE JESSEL, Q. C., and Mr. GLASSE, Q. C., were not called upon to address the House. The case is fully reported in the 3d series, Vol. 9, p. 485.

The following opinions were delivered by the law peers:

The Lord Chancellor, LORD SELBORNE.

My lords, in this case, by allowing proof before answer, the lord ordinary did not decide the question of relevancy; but, on the reclaiming note, the Inner House found that there was no relevancy in the appellant's averments; so that the real question now is, whether the Inner House was right or wrong in so deciding.

The burden of proof undertaken by the appellant is certainly a heavy one; yet Mr. Innes did not shrink from the principle involved in the form of remedy which is sought. He said that, in the view of the law, there was nothing at all to be leased. That was a startling proposition, looking at the instrument, and considering the nature of the subject-matter which it comprehends, namely, all the minerals and materi-

als under particular lands, stone being specially but not exclusively mentioned, and all minerals of whatsoever kind they might happen to be. The principle of the argument was, that by the Roman law, adopted into the law of Scotland, there is a warranty implied or expressed (I do not know which it may be but that there is certainly a warranty in one way or the other) of possession of a subject capable of producing the contemplated fruits or profits.

Now, in one point of view, such a doctrine may be, and I venture to say is, perfectly intelligible and perfectly reasonable. When there is that which, in the language of the law of this country, would be called a total failure of consideration—when the landlord has not the thing to let which he purports to let, and which is the consideration for the rent, it is perfectly reasonable that the whole lease should fail *ab initio*, and be subject to reduction. Nor is it a very wide extension of that principle to say that if a landlord warrants a continuation of the subject-matter for a certain number of years, a total failure of the subject-matter before that number of years has elapsed shall involve a reduction or termination of the contract at the time of that failure and thence forward. Those views are perfectly intelligible. But they all resolved themselves into either the original non-existence or the subsequent exhaustion or failure of the subject-matter. And when the authorities which have been referred to are considered, they will be found, with a few if any, exceptions, to turn entirely upon that principle so understood. The Roman text, *si frui non liceat*, Dig. 19, 2, 15, 1: *Ex conducto actio conductori datur, si re quam conduxit frui ei non liceat*. In the Roman law mines and quarries are uniformly spoken of as yielding *fructus*: Dig. 7, 1, 9; *Ibid.* 24, 3, 8. Points at cases where possession is not given; where there is no prestation of the subject-matter, or where some external *vis major*, not inherent in the subject-matter, and not the fault of the tenant, takes the subject-matter away, either temporarily or permanently; but the principle is always the same, resting on the destruction *pro tanto*, or entirely, of the subject-matter. But Lord Stair, Book 1, T. 15, S. 2, under the heading of *Location and Conduction*, the authority on the law of Scotland chiefly relied upon, goes further, and, as

it seems to me, lays down the true principle in the most unequivocal terms. He says that there is a peril or risk undertaken by the lessee; that he is at the risk of the quantity and the value of the subject-matter, but he is not at the risk of the being or existence of it.

If there had been in this case a lease of some particular description of minerals only—for instance, of a bed or seam of coal, or of a bed of freestone—and if there had been no such thing in existence, then, according to Lord Stair's principle, the tenant would not have been at the risk of the "being or existence" of the coal or the freestone. But that, of course, can not apply to a case where the lease is of *all* minerals; for although there is necessarily some uncertainty and speculation in such a lease, because the minerals may turn out to be of greater or less value, yet some minerals there necessarily must be under every parcel of land, and therefore the peril of the "being" of the minerals is a peril which no tenant of such a mineral lease incurs; nor does the landlord incur it either. But with respect to the quantity and value, which is the whole matter in controversy here, as I understand the case, according to Lord Stair's doctrine, the whole peril of the quantity and value is under such circumstances upon the tenant; so that that authority is directly against the appellant's case.

Then we are referred to Lord Bankton, who in the passages quoted seems to say that the landlord warrants a capacity to produce fruits: Vol. I, 20, 13, 14; Vol. II, 2, 9, 24. What is the meaning of that? A capacity to produce the kind of fruits which, according to the substance of the contract, the tenant is to receive. What are the fruits within the meaning of that principle? If, for instance, land is let as good, arable land, and it turns out to be totally incapable of any agricultural produce, I can understand that in that case the principle might apply, and that there is a failure of the warranty to produce fruits.

Again, I can understand that if, in the case of a mineral lease, the landlord, in substance, represented that there was workable coal, and the coal turned out, as in the case of *Murdock v. Fullerton*, Feb. 12, 1829, 7th series, p. 404, to be so nearly exhausted that there was no area of the least value for

working—in other words, nothing which could be worked—a thin seam, for example, of a finger's breadth—something which was not practically useful for the purpose of working at all, it may be said that in such a case there was a failure of the landlord's warranty. But the fruits in this case are minerals to be got by working, and according to Lord Stair, the quantity and the value of them, if they can be got by working, are at the risk of the tenant. If the minerals can be got, there are the fruits, and there is no failure whatever of fruit in such a case. There is no sterility as long as there are minerals which may be got.

The case of *Edmiston v. Preston*, Morr. 15, 172, would be regarded at the present day as turning upon a thing for which the tenant was responsible. But the principle upon which that case was decided was evidently the same as if an earthquake or some natural convulsion had made the mine practically unworkable.

The case of *Dixon v. Campbell*, 2 Shaw's Appeals, 175, as far as it is fit to refer at all to an authority turning upon contract and not upon general law, is strongly against the appellant's argument, because in that case, there being an express contract that if the mine should cease to be capable of being worked to advantage by reason of that class of accidents which all these authorities contemplate, the tenant might throw it up, it was expressly laid down that he could not throw it up for a failure which did not occur in the mine, but in the profits, on account of the variations in the market price. What has arisen in the present case but a question of market price?

The third article of the condescendence tells us that there is freestone under the lands of Baberton, and that four years were occupied in boring and in other operations to obtain it. I pass over the allegation that the quantity is less than was represented, for nothing now turns upon that.

The appellant goes on to say: Nor is the said freestone or any other mineral or material or substance in the lands so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease even if no rent were to be paid. I will stop reading that sentence there, because I agree with Mr. Innes that he does not take issue merely upon

the point which follows, that the minerals are incapable of being remunerative at the rent stipulated for in the lease. He also says that even if no rent were to be paid they are not capable of being worked to a profit. He goes on: The pursuer has tried the said lands at all points showing indications of freestone, but he has in every case been unable to turn out such a quantity as would repay his outlay, even upon the most economical methods which can be used for the efficient working of minerals capable of being worked and finding a market. But what he says is that they are not capable of being worked to a profit. That so far as he has worked he has been unable to turn out such a quantity as would repay his outlay.

Therefore, the proposition really is this: that according to the principles laid down in the law of Scotland the landlord guarantees the tenant against loss by reason of any of those elements extrinsic to the mine and independent of the nature of the subject-matter within the mine which go to the determination of the question of profit and loss. What are those elements? The quantity, the quality, the cost of labor, the cost of materials, the demand and supply varying in the markets, the accessibility of the markets themselves, and the means of conveyance—all which are things entirely extrinsic to the mine, and certainly not within the view of the principle laid down by any of the authorities to which a reference has been made. On the contrary, they are exactly those things as to which Lord Stair has said that the tenant runs the “risk of quantity and value.”

My lords, it therefore appears to me that even the authorities relied upon by the appellant are against the view of the law which he suggests. But when we come to look at the stipulations in this particular lease we find that conclusion fortified by those stipulations.

It is admitted that it is a very common thing with parties entering into mining leases to contract expressly that the tenant shall not be obliged to go on with the lease when he can not work the time to profit, and the parties very wisely add a clause providing for an arbitration. There is nothing of that sort in the lease before us; but there is a provision that at the end of three years, or at the end of seven, or at the end of

fourteen years, the tenant may "break," as it is called, or throw up the lease, a provision absolutely irreconcilable with the whole principle of the appellant's argument; because, if the lease was vitiated from the beginning, and liable to reduction, it must have been upon grounds which are wholly independent of the exercise of an option at certain periods to retain or to throw it up. I had really great difficulty in understanding whether it was seriously meant to be contended, that because the lessee had made no profit he would not only have a right to throw it up but he would also have a right to repetition of the rent he had paid. That seemed to me to be almost a necessary consequence of the appellant's argument, although utterly inconsistent with the whole intent and purpose of the express contract between the parties. On these grounds, my lords, I am of opinion that the interlocutors appealed from ought to be affirmed and the appeal dismissed with costs.

LORD CHELMSFORD.

My lords, I entirely agree with my noble and learned friend. The law, as laid down by Mr. Bell, Principles, Sec. 1208, makes it quite clear that where there is a total destruction or exhaustion of the subject-matter of a lease, there the lessee is entitled to abandon it. But I am not aware that where it is a case of sterility merely the tenant has any such right. The old authorities upon the subject rather, to my mind, indicate directly the contrary.

A distinction has been taken between agricultural and mineral leases, upon the ground that a lease of minerals is a hazardous speculation; and Lord Deas (3d Ser., Vol. 9, p. 490), says that he knows no case where a mineral lease has been brought to an end upon the ground of sterility.

Here the appellant has fenced himself round against the possibility of loss by reason of the sterility of the subject-matter. He stipulates that for the first year no rent whatever shall be payable. He then stipulates that upon giving six months' notice at the termination of the third, the seventh, and the fourteenth years respectively, he may, without any cause assigned, abandon the lease. Now this is entirely for the benefit of the tenant. The landlord has no corresponding

right of giving notice and turning the tenant out of possession. Therefore, it seems a most reasonable thing to hold that where a special contract of this description is entered into (even supposing the common law would give the right of reducing the lease, which I am quite certain, from the authorities, it would not) it is impossible to say that the tenant can be fairly and reasonably entitled to reduce the lease, even supposing circumstances existed which, without a contract, would have entitled him so to do.

LORD COLONSAY.

The question is, whether the appellant has presented such a statement as entitles him to be relieved from the contract, in respect of the fact that he can not work these minerals to profit. I am not aware of any case in which that has been decided in regard to a mineral lease. All the cases, without exception, which have been put before us, are cases substantially of the non-existence or exhaustion of that which had been the subject of the lease.

Now, in this case, the tenant has fenced himself round with protection as to any kind of occurrence that can take place. He did not stipulate for relief by means of a reference to arbitration, but he protected himself, as if he had no basis of common law to rely upon, by conditions which enabled him to break the lease at the end of three, seven, or fourteen years.

I think the court below has taken the right view in looking at what was in the contemplation of the parties; the contract, being in every respect favorable to the tenant, who in my opinion has shown no ground for the relief which he now seeks.

LORD CAIRNS.

This case is at once an example of an attempt to make use of a suit for the purpose of obtaining relief upon a ground which was not in contemplation at the time when the suit was commenced, and of an effort to strain a well known principle of law to a purpose to which that principle was never intended to apply.

The whole foundation of this suit originally was an allegation that there had been a specific representation and an express warranty given by the lessor, to the effect that there was "a large stratum of freestone in the lands proposed to be let, of a superior quality, and capable of being worked to profit;" there being no reference whatever to any implied warranty in law. The second article of the condescendence states that, on "the faith of these representations, and in and under an essential error as to the subject of the lease," the appellant signed the lease in question.

These averments are now altogether out of the case, and we have an attempt to make out that, although there was no specific and express warranty, there is a law in Scotland which implies warranty to the same effect.

My lords, it appears to me that the observations of the lord ordinary in dealing with the question of express warranty and representation are very applicable also to the question of warranty implied by law. The lord ordinary remarks that such representations "are subject to many contingencies, as for example, the skill and capital of the tenant, the rate of wages, the state of the market, costs of transit, and many other elements of hazard; such representations therefore are mere matters of opinion, which, even if erroneous, could not form a good ground for reducing the lease." (3d Ser., Vol. 9, p. 487.) I entirely agree with the observations of the lord ordinary, but I own I am at some loss to understand why they are not quite as applicable to a warranty implied by law as they are to an express warranty averred to have been given by the lessor; and I am at some loss to conceive, when the lord ordinary felt that there would be these difficulties in allowing a proof as to express warranty, that it did not occur to his mind that to a much greater degree they were impediments in the way of allowing proof as to what I have termed an implied warranty of law.

The averments do not even now assert that there are no minerals, or that there is no freestone; but merely that they are not capable of being worked to profit, an averment which implies their existence.

There is a common form of covenant in mining cases, that if the minerals can not be worked to a profit there shall be an opportunity to the lessee of giving up the lease upon certain terms stated. That covenant is generally accompanied with

a specification of means for ascertaining, by the award of arbitrators or by the opinion of experts, whether it can be predicated of the mine, at a particular time, that it can not be worked to a profit. The word "profit" is there used in a sense altogether different from that in which the appellant would use it here; because, where you have an express covenant, "profit" does not mean gain after paying for work and labor, but it means gain after paying for work and labor and the rent of the mine—a very different position of things from that for which the appellant contends.

There is a well known principle of the civil law that where the subject-matter demised turns out to be non-existent, or to be exhausted, or where the working of it turns out to be utterly impracticable, the tenant is relieved from the obligations of the lease. It is attempted to bring up that principle to this case, and to say that it gives to a tenant relief in the same way that the express provision, to which I have referred as being common in mining leases where minerals can not be worked at a profit, would give the tenant relief.

I asked the learned counsel for the appellant, in the first place, is there any decided case in support of that proposition? The learned counsel who argued for the pursuer at your lordships' bar were unable to produce any. Undoubtedly, some institutional writers have been referred to, and I take Sir George Mackenzie as an example of them. Sir George Mackenzie, Inst. 3, 3, 5. Sir George's words are: "If the ground be absolutely barren, the hire will not be due; but if the land yield some profit, though never so little, the hire will be due if the profit exceed the expense of the seed and laboring"; speaks of a tenant not being obliged to pay rent where there is sterility; and he says, describing it negatively, that there is no sterility where the fruit, the crop, the harvest, exceeds the value of the labor and of the seed. Even with regard to agricultural subjects, I should venture to doubt whether, at the present day, that *dictum* of Sir George Mackenzie is to be taken without very considerable qualification. I took the liberty of putting the case to the appellant's counsel, that there might be a lease of waste or moor land, which a tenant might well be content to take, intending to reclaim it by degrees, and as to which in any one year, or in any small number of years, it might be utterly impossible to say that there

had been any fruit exceeding the seed and the labor; and yet it would be a very strong proposition to hold that the tenant could throw up a lease of that kind because the fruit had not exceeded the seed and the labor. Again, there might be land which might be allowed to run into sterility and become unproductive by the fault of the tenant himself; there also the *dictum* would not apply.

But without pursuing the question with respect to agricultural leases further, I should doubt extremely whether *dicta* of this kind apply at all to leases of mineral subjects; for, although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase; there is no sowing or reaping in the ordinary sense of the term, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil. It is very difficult to apply to a case of that kind *dicta*, which evidently relate to the ordinary process of agriculture.

It is obvious that if these *dicta* were held to apply to mineral leases, the tenant, if he found his lease profitable, would continue to hold it, and reap the profit from it; but if he found it unprofitable, he would certainly give it up, and the loss would be not his, but the landlord's.

Again, my lords, it would be impossible to apply these *dicta* to mineral leases without some knowledge of the area of time over which to spread the account of profit or of loss. I asked Mr. Pearson, who opened the case with great ability for the appellant, to what time he would refer the question of the profit or loss, and I think he was obliged to admit that he would take the whole period covered by the lease, without counting the breaks, which, in the present case, would be a period of twenty-one years. Then I asked, how would it be possible at the end of the third or the fourth year of the lease, to speculate as to what the profit or loss would be if it were spread over the whole period of the lease? How can you at the end of the third or the fourth year of the lease tell what

the price of labor may be in future years; or what machinery may be introduced in future which may dispense, to a certain extent, with labor; or what the market value of minerals of the same kind will be at a future period, or what the effect upon the market value of those minerals may be of the discovery of other minerals of the same kind in the same neighborhood? All those things are perfectly uncertain.

Then, my lords, finding that there is no decided case which is an authority for the contention of the appellant, and that there are no *dicta* of institutional writers which can properly be applied to a case of this kind, I have no hesitation in saying that the appellant has utterly failed to establish that there is in the case of a lease of this kind any implied warranty in law approaching to that express warranty which, in the first instance, he asserted had been given by his landlord. It is upon this ground that I should wish to rest the decision of the case. And I do so the more particularly for this reason, that I observe that some of the learned judges in the court below were rather inclined to rest it upon another ground; namely, to assume that there may be the common law right for which the appellant contends; but that, on the other hand, that common law right is ousted by the express provisions contained in this lease with regard to breaks. If I found that there was a common law right such as has been alleged, I should have great hesitation in saying that anything in this lease did oust that right. If there is such a common law right, I do not see that it is in the least degree impossible that it should co-exist with a lease containing a provision for breaks. I do not, therefore, hold that the common law right is excluded by the provisions of this lease, but rather that these provisions are to be regarded as a proof that it never was imagined by those who entered into it that there was any such common law right; because, if there was such a common law right, these provisions, to a great extent at all events, would have been unnecessary.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellant's Agent: JAMES DODDS.

Respondents' Agents: GRAHAMES & WARDLAW.

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1. *Irrigation considered as a climatic necessity* makes the right of ditch-transit, which is essential to its enjoyment, analogous to the case of a way of necessity. *Yunker v. Nichols*, 64
2. *Irrigation recognized at common law.*—The owner of a close may lawfully use the water of a brook bounding his close, for husbandry, by making small sluices for the purpose, and if the owner of a close is damaged thereby, it is *damnum absque injuria*. *Weston v. Alden*, 82
3. *Instance of the common law rule applied to irrigation.*—Where a spring of water rises upon the land of one owner and from it runs a stream onto the land of another, the owner of the land upon which is the spring has no right to divert the stream from its natural channel, although the waters of the stream are not more than sufficient for his domestic uses, his cattle, and for the irrigation of his land. *Arnold v. Foot*, 83
4. *Apportionment of water by commissioners, void.* The powers conferred upon the commissioners authorized to be appointed for the apportionment of water when the supply is not sufficient to meet the continual wants of all appropriators, under "An act to protect and regulate the irrigation of land in Montana Territory," approved January, 1865, are clearly judicial, and the acts of such commissioners are without authority of law, and void. *Thorp v. Woolman*, 87
5. *Right of appropriation limited by statute.*—The statute referred to recognizes the right of appropriation of water for irrigation, limiting it, however, to persons owning land upon the banks of the stream from which the same is taken, and also limiting the quantity he can appropriate to what is necessary to irrigate his land. *Id.*

IRRIGATION. *Continued.*

6. *Reasonable use—How determined.*—Each riparian proprietor may make a reasonable use of the stream, and what this is depends upon the circumstances of each case. It would not be permissible to take the water at some distance above, and return the surplus at some distance below the land of the proprietor using it, if thereby a considerable portion of the water is wasted to the injury of the proprietors below. *Union M. Co. v. Ferris*, 91

7. *Adverse use without actual damage.*—There may be an invasion of the right which will justify an action although no actual damage is shown; as, if one should divert a portion of the water permanently from the stream, such a diversion, if continued the requisite length of time, would ripen into a title; but if the riparian proprietor only exercises his natural right in the use of the water without damage to the servient tenement, then the use is not adverse. *Union M. Co. v. Dangberg*, 113

8. *Form of decree between mill-man and irrigator.*—Where there was a right in one to a first use and a right to the surplus in another, and (owing to its variable flow) the water could not be divided by inches, the decree was drawn, restraining diversion of the water to the injury of plaintiff, with a *proviso* allowing use of surplus to the defendant. *Id.*

9. *Appropriation of water.*—Irrigating companies can not control running water except by legal appropriation thereof, and any person, a stranger to such company, has a right to appropriate water not legally appropriated by others. *Munroe v. Irie*, 127

10. *Territorial control of water, limited.*—In this country lands are open to all persons, as also the appropriation of running waters, and the Territorial Legislature has no power to enact laws that will permit an irrigating company to control or manage the water of any part of the Territory in disregard of the rights of individual claimants. *Id.*

11. *Parol division of water enforced.*—Where riparian proprietors have divided the water of a stream by mutual consent, and each party has constructed ditches and enjoyed the water for years under such parol agreement, it is an agreement which will be enforced in equity, and each party limited to his agreed share. *Coffman v. Robbins*, 131

See INJUNCTION, 1; RIPARIAN RIGHTS; WATER.

JURISDICTION.

1. *Transfer of causes.*—Under the clause "arising under the constitution and laws of the United States," found in section two, 18 Stat. 470, of the act to determine the jurisdiction of the United States courts, passed March 3, 1875, only such suits can be transferred from the State to the national courts as involve a disputed construction of the constitution and laws of the United States. *Trafton v. Nougues*, 138

2. *Federal jurisdiction in mining suits.*—In an action to recover for trespass upon a gravel gold mining claim, and seeking an injunction restraining the working of the claim by defendant, a petition was filed by the defendant for the removal of the cause to the United States court, in which it was alleged that the defendant located and held his claim under the several acts of Congress relating to the subject, but it did not appear that any question was involved other than is usual in the trial of rights to

JURISDICTION. *Continued.*

mining claims or which might not be determined by the local laws, rules and customs, without reference to the acts of Congress. *Held*, that the petition did not show such a state of facts as to warrant the transfer, and the case was, on motion, remanded to the State court. *Id.*

3. *Petition for transfer—What it should state.*—A petition for transfer should state the exact facts, and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself, from the facts, whether the suit does really and substantially involve a controversy within its jurisdiction. *Id.*

4. *Petition alleging legal conclusion insufficient.*—An allegation in a petition for removal that "the rights of the plaintiff as against defendant must be determined under the laws of Congress of the United States," is a statement of a legal conclusion rather than a fact; it states merely the opinion of the petitioner and will not justify a transfer. *Id.* See INJUNCTION, 2.

JUROR.

1. *Stockholder at date of suit disqualified as juror.*—A person who is a stockholder in a mining corporation at the time a suit is commenced against it, is, under the statutes of Nevada, liable for his proportion of the costs incurred by the corporation in such suit, and is therefore disqualified to act as a juror, although his connection with the corporation was severed before the trial. *Fleeson v. Savage M. Co.*, 153

2. *Error in overruling challenge for cause, cured.*—If a court refuses to allow a challenge for cause against a juror who is disqualified, and the same juror is afterward peremptorily challenged, and there is no objection to the twelve jurors who find the verdict, the error of the court in overruling the challenge for cause is cured by the peremptory challenge. *Id.*

3. *The fact that a peremptory challenge is used to set aside a juror who should have been set aside for cause, will not authorize a reversal, unless it is made to appear that the peremptory challenge was needed to excuse an objectionable juror.* *Id.*

4. *The court will not presume without an affirmative record that a party exhausted his challenges.* *Id.*

5. *Imperfect record—Presumption as to disqualified juror.*—In a case in which G., a disqualified juror, was challenged for cause, and the challenge overruled, if the record does not show whether he served as a juror or not, and there is no assignment of error on the ground that he did so serve, but only that appellant was compelled to challenge him peremptorily, it will be assumed by the Supreme Court that he was peremptorily challenged. *Id.*

LACHES.

1. *Injunction refused on account of laches.*—Injunction being sought against the draining of a coal mine preparatory to working the same on account of alleged injury to a canal, it was refused on account of the laches of plaintiffs for two years, permitting expenditures. *Birmingham Canal Co. v. Lloyd*, 166

LACHES. *Continued.*

2. *Special risk—Special vigilance.*—Mineral property, of all properties, perhaps the most requires the parties interested in it to be vigilant and active in asserting their rights. *Prendergast v. Turton*, 167

3. *Facts of the case—Delay by forfeited shareholders.*—The plaintiffs, shareholders in the "United Hills Mining Company," had paid all calls on their shares, when, in 1826, a new assessment was laid, against their protest. In 1828 their shares were declared forfeited. The concern was then worked at a loss till 1835, when it began to make a profit. In 1838 they filed their bill. *Held*, that the rights of plaintiffs were barred by laches, and their failure to show good cause for the delay, although the improper nature of the forfeiture was conceded as well as many other acts of misconduct by the directors during the interval. *Id.*

4. *Laches of excluded partners.*—Managing partners in a mining partnership at will gave notice of dissolution to the rest, and intimated their intention after the dissolution to apply for a new lease for their own exclusive benefit. They did so, obtained a new lease, and carried on the colliery to a profit. The excluded partners continually asserted their right to share in the profits, but took no active steps to enforce it for nine years: *Held*, that they were precluded by laches from any relief. *Clegg v. Edmondson*, 180

5. *Special risk of mines.*—The rules as to laches and acquiescence governing cases of direct trust and applying to property of an ordinary character, do not apply to constructive trusts affecting property like mines, subject to extraordinary contingencies and requiring large expenditures without any certainty of returns. *Id.*

6. *Clamor without contention.*—The continual assertion of a claim, without any act done to give it effect, will not keep alive a right which would otherwise be precluded. *Id.*

7. *Delay prevents specific performance.*—In March, 1850, defendant agreed to grant the plaintiff a lease of twenty-one years on a coal mine. Three months after, defendant gave notice that unless plaintiffs commenced work in a month, he would consider the agreement abandoned. Two years after, plaintiff entered and commenced working but was resisted by defendant. The working, however, proceeded, until abandoned in 1853. Five years later plaintiff attempted to resume work, and filed a bill for specific performance. It was dismissed, with costs, on the ground of laches. *Sharp v. Wright*, 202

8. *Laches applied to sale of mine.*—The defense of laches applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property. *Ernest v. Vivian*, 205

9. *Bill to set aside lease and for an accounting—Laches defeats attempt to avoid the lease.*—A was tenant for life of estates, with an ill-defined power of leasing the minerals thereunder. In 1840 he granted a lease of the mines for a long term of years, and died the same year. B, the remainder-man in tail to the property, was then an infant. He entered into possession and attained his majority in 1846, when he executed a disentailing deed. He then first discovered the existence of the lease granted by A, and protested against the validity of it, as not being authorized by

LACHES. *Continued.*

the power, and as being obtained by fraud; and he refused to receive the rents and royalties reserved thereby. In 1852 he agreed to sell the whole estate to E, but with a stipulation that he should receive the rents and profits of the mines of the estate until August, 1856. In 1855 B and the representatives of E, who had died, conveyed the whole property to the plaintiff in this suit, who had throughout acted as B's agent. B died in 1856. In 1860 the plaintiff filed this bill, alleging that he had then first ascertained the nature of the lease of 1840, and the circumstances under which it was granted, and praying a declaration that it was void, or that it was obtained by fraud and ought to be set aside, and an injunction, or in the alternative, if the court should think the lease valid, then for an account and further relief. *Held*, that on the ground of laches alone, the plaintiff was not entitled to a decree on the first part of his prayer, and the bill must be dismissed; but without prejudice to his filing a bill for an account on the footing of the validity of the lease, or to his taking such proceedings at law as he might be advised. *Id.*

10. *Irregular foreclosure cured by delay of debtor.*—Where a party gave a mortgage to secure several notes, and the assignee owning the whole indebtedness sued on a portion of them, obtained judgment and sold the land, which was not redeemed, and the party obtaining the sheriff's deed had entered upon the land and opened a coal mine. *Held*, upon bill filed by a grantee of the mortgagor to redeem nine years after the sale, that the sale was a foreclosure, and that the great length of time before an effort to redeem was made, waived any irregularity in the sheriff's sale. *Rigney v. Small*, 217

11. *Increased value.*—A party can not lie by and await the increase in value of property by mining, and then assert his rights as against a sale merely voidable. *Id.*

12. *Ultra vires affected by laches.*—Even if expenditures were *ultra vires*, stockholders knowing of them and not objecting until long after their completion, could not compel the directors to account for the moneys expended. *Watts' Appeal*, 223

13. *Assent of stockholder presumed.*—When an act of directors is in excess of their authority, but done with a *bona fide* intent of benefiting the corporation, and a shareholder knowing of it does not dissent within a reasonable time, his assent will be presumed and he can not gainsay it. *Id.*

14. *Protest not enough, without suit.*—When the act of the directors complained of is to be followed by a large expenditure, the shareholder should not only make his protest within a reasonable time, but should follow it up by active preventive measures. *Id.*

15. *Laches operates as a bar.*—It is against good conscience that one having power to prevent should stand by and see his associates spend money which may result to his benefit, and afterward charge them with it. His neglect to act at the proper time effectually bars his right. *Id.*

16. *Laches, within limitation period.*—As a general rule, a constructive trust as to personal rights may be asserted at any time within six years after the knowledge of the facts creating it; but *laches*, for a shorter

LACHES. *Continued.*

period, aided by other circumstances, will bar the right. *Evans' Appeal*,
255

17. *Relief sought through corporate equities.*—Where the bill is brought by stockholders, praying the payment of money, not to themselves but to the corporation, and seeking relief through the equitable rights of the corporation, the knowledge and conduct of the corporation become essential to be considered; and the facts on which relief is asked appearing on the minutes of the corporation, a delay of nearly six years amounts to an acquiescence. *Id.*

18. *Rights intervening, pending the delay.*—Allowing money to be borrowed and judgments against the company to be obtained and their property sold, the facts for relief being meanwhile patent to the plaintiffs: *Held*, such intervening circumstances as made the delay unreasonable, and fatal to the bill. *Id.*

19. *Laches will bar a plaintiff against acts originally voidable.* *Id.*

20. *Subsequent plaintiffs.*—The *laches* of parties made plaintiffs by amendment after the suit was commenced, *considered* as running up to the time of their seeking to become parties. *Id.*

21. *Delay and allowing expenditure.*—A bill was filed to establish a right to profits from a mine and for a division of the property, complainant claiming under a lease of an undivided interest in the mines, the remaining interest, including the reversion, having long before passed to the defendant. *Held*, properly dismissed for unconscionable delay on proof that complainant, with full knowledge of what was being done, had allowed defendant to expend money and erect costly works to develop the mineral resources of the land, he, the complainant, not asserting his claim in court for more than twenty years after defendant had acquired its original interest in the property. *Harlow v. Lake Superior Co.*,
285

22. *Laches may confirm irregular forfeiture.*—At a meeting of the partners in a cost-book mine in 1874, it was stated that the mine was £2,003 in debt, and a call for £25 was made upon each of the six shares of the mine. Two of the partners did not pay this call and were in arrears for other calls. At subsequent meetings in June, 1874, the shares of these two partners were declared forfeited. The mine was still in debt in 1878. The owners of the forfeited shares took no steps until July, 1879, when they made a claim, and in September, 1880, they brought their action claiming that the shares had been irregularly forfeited and that they were still partners.

Held, that even assuming the shares to have been irregularly forfeited, the plaintiffs, after such delay, under such circumstances, could not successfully assert their claim to be partners.

Clarke v. Hart, 6 H. L. Cases, 633, distinguished. *Rule v. Jewell*,
291

See MORTGAGE, 1.

LAND.

1. *Soil.*—The word *soil* in an inclosure act construed to mean surface. *Pretty v. Solly*,
301

2. *Real estate, what constitutes.*—Coal and other mineral in a mine

LAND. *Continued.*

and under the soil are real estate, and as such are capable of being conveyed like any other real estate, and when once conveyed by deed, may pass by inheritance or deed of conveyance. *Manning v. Frazier*, 307

3. *Devise of quarry and its rents.*—The owner in fee of land containing a stone quarry, having mortgaged and leased the quarry, devised it to his son with directions "that the rents arising from the quarry be applied to discharge the incumbrances on the same": *Held*, that the rents due at the date of testator's decease passed to the son as parcel of the devise for the purpose directed, and not to the executors. *Emery v. Ovinger*, 78

4. *Debt and rent out of same subject-matter.*—The direction to apply the rents to debts arising out of the subject-matter of the devise compels such construction; if the direction had been to pay debts generally, it would be otherwise. *Id.*

LEASE.

1. *Royalty implies covenant to work.*—An agreement for a lease calling for no rental except the royalty out of coals to be dug construed to require the lessee to commence working immediately and to proceed continuously. *Sharp v. Wright*, 202

2. *Open and unopened mines.*—Under lease of lands not mentioning mines the lessee may work the open but not the unopened mines. *Astry v. Ballard*, 316

3. *Lessee of exhausted colliery relieved in equity.*—Plaintiff, lessee of a colliery at a rate of so much per wey, the colliery becoming not worth working, and plaintiff offering to pay for all the coal that could be got; *Relieved*, upon terms, against the future rent and the covenant in the lease to work the colliery. *Smith v. Morris*, 317

4. *Covenant construed to imply perpetual renewal.*—A granted a lease and covenanted that he would always, at any time when requested by the lessees, etc., demise the premises for the further term of thirty-one years, in which new lease were to be contained the same covenants, articles, clauses, provisos and agreements. *Held*, that this amounted to a covenant for a perpetual renewal. *Copper M. Co. v. Beach*, 326

5. *Form of recital in renewal lease.*—A testator covenanted for a perpetual renewal of a lease. *Held*, that the proper form of lease to be granted in renewal, was a demise for the new term, reciting the original covenant. *Id.*

6. *Reservation during outstanding lease.*—The owner of land having leased a marble quarry thereon for ten years, afterward conveyed the land to a third party, "reserving the use of the quarry until the expiration of the lease." The lease was canceled within the ten years by the parties to it. *Held*, that the reservation was not thereby extinguished, but that it would remain in force till the end of the ten years. *Farnum v. Platt*, 330

7. *Fairly workable.*—A tenant agreed to work a coal mine so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it: *Held*, that under these circumstances the tenant was not bound to work the mine, and that under the words "fairly workable" a tenant was not bound to work at a dead loss. *Jones v. Shears*, 333

LEASE. *Continued.*

8. *Intent, not form, determines instrument a lease.*—Whatever words are sufficient to explain the intent of the parties that the one should divest himself of the property, and the other come into it for a determinate time—whether they run in the form of a license, covenant or agreement—will, in construction of law, amount to a lease as effectually as if the most proper and technical words were made use of for that purpose. *Watson v. O'Hern*, 333

9. *Implied covenant to work—Repeated actions for repeated breaches.*—A lease of a stone quarry, in consideration that the lessee shall pay to the lessor a certain price per perch for all stone taken out of it, is a contract on the part of the lessee that he will work the quarry; and upon his failure so to do, the lessor may maintain covenant on the contract, and recover damages. And one verdict and judgment on such contract pending the lease, is not a bar to another when the term is further advanced. *Id.*

10. *Rental enforced against lessee of uncorkable mine.*—Plaintiff was lessee of a coal mine at the rent of £300 a year, and subject to a royalty of ten shillings for every wey of coals raised in each year above 600, that being the quantity considered to be paid for by the £200 a year, and he was authorized to determine the lease on the coal being worked out. Plaintiff worked the mine for several years, and when it was nearly exhausted he was prevented by accidents and defects in it from continuing work except at a ruinous expense. The court refused to restrain defendant from suing to recover the £300 a year, although the plaintiff offered to pay him ten shillings per wey for all the remaining coal. *Phillips v. Jones*, 344

11. *Unconscionable covenants not aided in equity.*—Lessee of mines covenanted that if the lessor should at any time before the expiration or determination of the lease give notice in writing to the lessee of his desire to take all or any part of the machinery, stock in trade, implements, etc., in and about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified to the lessor on his paying the value, such value to be fixed by arbitration. *Held*, that the covenant was so injurious and oppressive to the lessee that the court ought not to interfere by injunction to prevent its breach. *Talbot v. Ford*, 347

12. *Covenant as to mixing ores.*—A lessee of iron works and mines covenanted to work the furnaces effectually unless prevented by inevitable accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself or *with a proper mixture* or process make good, common pig iron. *Held*, that the mixture intended was not necessarily of ore procurable on the demised premises. *Foley v. Addenbrooke*, 349

13. *Removal of machinery—Fixtures.*—The lease contained a covenant to repair and yield up the furnaces, fire engine, iron works, dwelling houses and all other erections, buildings, improvements, etc., *except the iron work, castings, railways, etc., machines, etc.* *Held*, that the lessees had the right to remove whatever was a machine or in the nature of a machine or part of a machine, but not what was in the nature of a building or support of a building, although made of iron. *Id.*

LEASE. *Continued.*14. *Mine exhausted under covenant to raise fixed annual amount.*—

The *Narr.* alleged that plaintiff let his interest in a coal mine to defendants, who covenanted to raise and work 13,000 tons of coal in each year, and pay at the rate of eight pence per ton royalty for the same, or pay that amount of money, to-wit, £433 6s. 8d., as fixed rent, whether the coal should be got or not; and also nine pence per ton for all coals beyond the 13,000 tons. *Breach*—that defendants had not raised 13,000 tons in each year and paid at the rate of eight pence per ton for the same, nor the fixed rent. *Plea*—after setting out the indenture on oyer that by the fair and proper working and getting of the coal, the same before and at the commencement of the said half year was greatly exhausted, and a small portion thereof only, being less than a fourth part of such 13,000 tons, was left and remaining to be worked and raised. *Held*, on demurrer, that this was an absolute covenant by the defendants that they would raise 13,000 tons of coal yearly, or if not, that they would pay the fixed rent, and that there was no implied condition that there existed coals to the amount of 13,000 tons yearly capable of being worked. 2. That the breach was well assigned. *Marquis of Bute v. Thompson*, 371

15. *Rubble stone not included in lease of the granite.*—A lease granting the right to quarry granite stone made to parties in the business of stone cutting. *Held*, not to carry the right to take the rubble stone. Granite stone is a well known article of commerce, sold by the cubic foot. Rubble stone is sold in mass or by the perch. *Emery v. Owings*, 378

16. *Facts of the case—Outstanding surface lease.*—In 1840 Nicholas Owings leased to defendants the Fox Rock quarry for the term of six years, and the lessees went into possession. In 1836, B & C, who then had the right so to do, had leased to D all their estate and interest, being two third parts of *all that lot* within the farm of N. O. called Fox Rock. for the term of five years, which prior lease, before action brought, had come to defendants as to one half. The metes and bounds in both leases were the same. In an action by the executors of Nicholas Owings for the rent due under the lease of 1840, it was *held*:

1. *Surface lease.*—That the lease of 1836 was a grant of the superficies of the soil and did not pass a right to the quarry. as it was not opened at the date of that lease.

2. *Surface and mining leases not conflicting.*—That the case is not one of conflicting leases; the deed of 1836 being a lease of the surface of the soil, that of 1840, a lease or license to quarry stone. *Owings v. Emery*, 387

17. *Open mines.*—If a man hath land, in part of which there is a mine open, and he leases the land, the lessee may dig the mine; as the mine is open and he leases all the land it shall be intended that his interest is as general as his lease. *Id.*

18. *"Recently worked."*—A recital in a lease dated in 1840, that a quarry "had been recently or a short time ago possessed and worked by W.," can not be understood as meaning that the quarry was opened four years previously. *Id.*

19. *Assignor of lease bound, notwithstanding subsequent modifications.*—The lessee is bound upon the covenants of his lease to his lessor,

LEASE. *Continued.*

after an assignment by the lessee, and is not released by a subsequent contract between the lessor and the assignee modifying the lease in matters not affecting the covenant sued on. *Fisher v. Milliken*, 395

20. *The relation of landlord and tenant as to a covenant for payment of rent can be dissolved only by an agreement between themselves, which equity would enforce. Id.*

21. *What will release assignor.*—Nothing but a surrender, a release or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant with his landlord. *Id.*

22. *Covenant against assignment—Subletting.*—A condition in a lease for years, or for life, that the lease is to be void if the lessee assigns, is valid. But a lessee under such a condition may associate others with himself in the enjoyment of the term, or may make a sublease. *Hargrave v. King*, 408

23. *Minimum rent exacted from exhausted mine.*—Coal mines were demised at a certain royalty per ton upon the coal which might be got, and also at the rent of £300 a year, or so much thereof as with the royalty should amount to that sum, such rent of £300 to be a minimum rent for the coal demised; and the lessee covenanted to pay the rents, and to work the mine. *Held*, that a court of equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working; but that, if the lessor were to sue upon the lessee's covenant to work the mine, the court would interfere. *Ridgway v. Sneyd*, 414

24. *Mine exhausted before lease.*—If all the coal had been gotten by ancient workings, that might be a case for equitable relief. *Id.*

25. *Partial merger of successive leases of underlying coal veins.*—A company, the owner of four veins of coal known as the P, Q, R and S veins, let the R vein in 1842, the lessee to take out 8,000 tons per annum. In 1846 they let the P vein to the assignee of the former lease on the same terms, the minimum being raised to 15,000 tons. In 1847 the same owners leased to H. & H., who had become the holders of the former leases, the R and S veins, which latter had never been opened—the lessees to take at least 50,000 tons from the four lodes. The lessors agreed to pay for certain work in faults (they being first consulted and approving by their consent in writing), out of the rent “hereinbefore agreed to be paid.” After the lessees had expended large sums the R vein yielded but a trifling amount of coal, and the S vein none at all. In covenant brought by the lessee upon the lessor's agreement to pay for the work done in the faults, it was *held*:

1. That there was no merger of the former leases except for the purpose of fixing the aggregate rent.

2. That the covenant to pay for work done in faults out of the rent of the “said veins” must be confined to rents accruing out of the R and S veins only, and this failing, it could not be charged to the lessors personally. *Lehigh Coal Co. v. Harlan*, 423

26. *Verbal modification of covenant.*—A verbal assent by the lessor's agent to the doing of work contracted for by writing under seal, if effectual, operates not to make a new covenant, but to make the lessor liable in

LEASE. *Continued.*

assumpsit upon the parol waiver, and the lessor can not be held in covenant in an action based on such waiver; *otherwise* if it had been a suit by the lessor where the lessee had waived a *condition precedent*. *Id.*

27. *Idem.*—Where a plaintiff sues on a covenant which has been modified by parol in a point essential to the defendant's liability, the written contract will be treated as abandoned or used only to mark the terms and extent of the new stipulations. *Id.*

28. *Account for tonnage rent previously settled on erroneous statements.*—The declaration alleged that plaintiff let mines to defendant at an annual rent and a tonnage rent, the terms being so arranged that the tonnage was to make the mine pay, one year with another, £400 per annum; and as breach of covenant, the failure to pay. The plea alleged an annual accounting, and acceptance by payment of the amount agreed upon. The reply averred the omission of items of ore by mistake and plaintiff's ignorance of the facts. *Held*, that a plea showing only statement of accounts on one side did not show an accounting binding on plaintiff; and in any event the reply was sufficient to avoid the plea, by the allegation of error in the account. *Perry v. Attwood*, 440

29. *Mining lease construed to include all purposes.*—The demise of land within defined boundaries in the ordinary form, followed in the *habendum* with "together with the quarry," etc., and the privilege of a wharf for use in hewing stones thereon, the rental being a royalty on the stone quarried. *Held*, a general demise without restriction of use although the main object may have been to allow of quarrying. *Burr v. Spencer*, 450

30. *Assignee of recorded lease against parol tenant.*—The owner in fee let a tract of land for a term of years by lease duly executed and recorded. Afterward with the assent of the tenant he resumed possession of a part of the demised premises and let the same by parol to S. While S. remained in possession of such part, the tenant for years, for a valuable consideration, conveyed all his interest to B., who had no knowledge of the lease to S. *Held*, that the parol lease to S. could not avail against ejectment brought by B. *Id.*

31. *Relation of lessor to equitable assignee.*—An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue such equitable assignee in equity on the covenants of the lease. *Coz v. Bishop*, 455

32. *Covenants to be construed together, and sweeping clauses controlled by the special.*—A lessee covenanted to leave at end of term, if lessor should require it, all the plant of the mine for the lessor, being paid for it at a valuation. By a subsequent clause he was allowed to remove the plant, unless lessor notified him of his intention to take it. *Held*, that the lessee was not bound to keep the machinery till the end of term, but might at any time give notice, and remove it, the landlord having the option, upon receiving such notice, to give a counter notice of his intention to take and pay for the plant. *Rolleston v. New*, 464

33. *A covenant to do nothing that would cause flooding of the mine,*

LEASE. *Continued.*

which the removal of its machinery would occasion, is not broken by the lessee removing such machinery under a clause allowing such removal. The lessor must protect himself by exercising his option of purchase. *Id.*

34. *A deed granting the right* to prospect and mine at a rent payable quarterly and running "so long as the party or successors may deem it proper to operate:" *Held*, a lease from year to year requiring a six months' notice to quit before the lessors could terminate it. *Patton v. Axley*, 472

35. *Lease construed with reference to forfeiture clauses.*—The lease of a coal bank provided that the lessee should put the same in good working order for the rent of the first year and thereafter pay a royalty on every bushel of coal taken from the bank; and that if the said coal bank should stand idle by the act of the lessee when it would yield coal for the term of one year it should be taken as an abandonment of the lease. *Held*, that this clause of forfeiture had no reference to the first year of the term and that the remedy of the lessor for violation of the covenant to put the bank in order that year, was by his action for damages only. *Moyers v. Tiley*, 474

36. *Lessee for royalty, bound to work.*—When a lease of land including quarries has been granted, the only rental being a royalty on the amount of stone quarried, it is not optional with the lessees to work the quarry or not; they are under obligations to improve the quarries in a reasonable manner during the term. *Brainerd v. Arnold*, 478

37. *Lessee not taking benefit of mistake.*—Equity will not reform on account of mistake where a lessee is not seeking to take advantage of the mistake and has not on request refused to allow it to be corrected. *Id.*

38. *No reform, to insert useless covenants.*—A lease will not be reformed by inserting a clause against cutting timber, where such cutting has not been attempted by the lessee and would be in violation of statute if attempted. *Id.*

39. *Covenant for lessees' quiet enjoyment—Lessor working mine above to the destruction of the demised mine.*—By indenture the defendant demised to the plaintiff a coal mine for a term of years, and covenanted that the lessees should hold and enjoy the mine during the term without any molestation, interruption or disturbance whatever, of, from or by the defendant. Afterward the lessor opened a quarry of ironstone on lands lying over the coal mine, and in the working of such quarry made holes from the strata of ironstone into the demised mine, and caused parts of its roof to fall in and the mine to be flooded, and the working of the coal rendered impracticable. *Held*, that the defendant had a right to excavate the quarry, yet as the excavation had caused an interruption of the plaintiff's occupation of the demised mine, the defendant was liable for a breach of his covenant for quiet enjoyment. *Shaw v. Stenton*, 488

40. *Interest of lessee defined.*—A lease of the right to mine coal is the grant of an interest in the land and not a mere license to take the coal. *Harlan v. Lehigh Coal Co.*, 496

41. *No implied covenant of existence of veins.*—Defendant let to plaintiff the right to mine coal from two certain veins named in the lease,

LEASE. *Continued.*

at a royalty. *Held*, that the lease contained no implied covenant of the existence of workable veins. *Id.*

42. *Property in oil found by lessee of salt wells.*—Defendants were the lessees of lands under covenant to sink and operate salt wells at a royalty of each twelfth barrel of the salt manufactured. After the wells were in operation some time, petroleum began to flow with the brine, and trover was brought against the lessees for its conversion. *Held*, that the oil was the property of the lessees. *Kier v. Peterson*, 499

43. *Engine working two mines—Apportionment of rent—Coal consumed by the colliery engines.*—The lessee of Ewanrigg colliery took a lease of the Ellenborough colliery adjoining, from the plaintiff, by which latter lease he was entitled to get the coal from the latter mine at a certain rent, with liberty to bring the coal got in the first mine to the surface by way of outstroke through the second, the Ellenborough colliery, on payment of one and one half pence per ton for outstroke, watercourse rent, and shaft rent. No rent was to be paid from any coal got from the latter colliery, which should be used by any engine employed in working or carrying on the second mine. *Held*, that no rent was payable for coal used in working the engine of the second mine when employed in bringing up the coal from the first mine, such engine being at the same time used in draining the second mine, because, (1) of the difficulty in saying what amount of coal was used for raising coal, and what amount for raising water from the other mine; and, (2) the coal consumed for raising might fairly be construed as paid for in the rent reserved for raising through the second mine. *Senhouse v. Harris*, 507

44. *Construction of covenant for surface support.*—By a mining lease the lessees covenanted *inter alia* that they would leave pillars "of sufficient strength to support the roof of the said mines." The lease contemplated an exhaustion of the mines. It also contained covenants to pay for surface damage. *Held*, that the lessees were liable to the reversioner for damage done to the surface of the land by its subsidence, notwithstanding the supports left were sufficient to support the roofs of the mines for purposes of further working as mines. *Hodgson v. Moulson*, 511

45. *When lessee may or may not work mines.*—A lease of lands, without mentioning mines, will entitle the lessee to work open, but not unopened, mines. If there be open mines, a lease of land with the mines therein will not extend to unopened mines; but if there be no open mines, a lease of land, together with all mines therein, will enable the lessee to open new mines. *Clegg v. Rowland*, 520

46. *Application of the rule.*—Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years, *without mentioning mines or mining leases*: *Held*, that the trustees had no power to grant leases of unopened mines. *Id.*

47. *Customary royalties.*—It is a custom in the Jo Daviess lead mining district for miners, mining on land without any agreement, to pay a royalty of one sixth of the mineral raised. *Alderson v. Ennor*, 526

48. *Facts of the case.*—Plaintiff and defendant owned adjoining min-

LEASE. *Continued.*

eral lands. A. went upon the land of defendant, sank a shaft and drifted into the ground of plaintiff and sold the mineral raised from plaintiff's land to the defendant, without retaining any royalty for the plaintiff. The mining was by permission of both owners. It was a proved custom in that locality for the ore buyer, at least if a smelter, to retain the royalty due the owner of the land. *Held*, that even if defendant were not a smelter, there was such privity between the parties as would create a liability, and that A. should be treated as the agent of the plaintiff in the sale of the mineral to the defendant. *Id.*

49. *Lessee working one mine in disregard of another.*—Two mines belonging to the same lessors, the one contiguous to the other, were leased by two leases to one lessee. One stipulation in each lease was that the lessee was not bound to mine more coal than could be taken away by cars furnished by a railroad company named. It was no excuse for not working one mine that the cars furnished were not sufficient to take away the coal mined in the other. *Powell v. Burroughs*, 531

50. *Increased value of coal left.*—That the coal which the lessee failed to take out according to his covenant was of greater value to the lessor at the end of the lease than if it had been taken out, is not a ground for reducing the claim for the breach to nominal damages. *Id.*

51. *Coal rent as liquidated damages.*—The rent per ton agreed for was stipulated damages to the extent of the non-performance. The uncertainty as to the extent of the injury is a criterion to determine whether it is a penalty or liquidated damages. *Id.*

52. *Parol contract to change written lease—Statute of Frauds.*—By a parol contract between the parties to a coal lease, the lessor agreed to forbear to enforce an accrued forfeiture and to permit the lessees to continue to work the demised premises and also to relinquish all claim for damages on account of the non-performance of a certain store contract which was supplemental to the lease. In consideration thereof the lessees agreed to pay three cents per ton on all coal already mined and four cents per ton on all coal thereafter to be mined under said lease, in addition to the payments stipulated for in the lease. The lessees continued to work in accordance with the terms of the original lease, and their possession was as well referable to the written as to the supplemental parol lease. In an action for damages for breach of the parol lease: *Held*, that not being in writing it was clearly within the Statute of Frauds, and there was no such performance as to take it out of the statute. *Crauford v. Wick*, 541

53. *Minimum rent—Instroke—Specific performance of working covenants refused.*—The plaintiffs let a coal mine to the defendant, receiving a minimum rent of £720, to be increased to £1,000 in case pits were sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessee covenanted to work the mine uninterruptedly, efficiently and regularly, according to the usual or most improved practice. The lessee paid the minimum rent, but only raised a small quantity of coal by working through an adjoining property without sinking pits upon the estate. Plaintiffs desiring a larger amount of working, whereby an increased

LEASE. *Continued.*

royalty would accrue, filed a bill for specific performance of the covenants in the lease. *Held*, that there was no obligation upon the defendant to sink pits, although that might be the most efficient mode of working; and that so long as the minimum rent was paid the defendants could not be compelled to work the mine at all; that the lessees had committed no breach of contract, but if they had, the remedy was at law and not in equity; and that the court could not, by a reference to chambers, give effect to the covenant by direction as to the management of a coal mine. Bill dismissed with costs. *Wheatley v. Westminster Coal Co.*, 553

54. *Measure of damages—Coal severed belongs to the tenant.*—In trover against a lessor for converting the loose coal on hand at time of entry for a pretended forfeiture, the court charged, upon the question of damages: "You allow, not for the expense of mining, but for the coal as mined, lying in the run. This includes the value of the coal itself—what might be called 'coal leave,' for although not paid for, it belongs to the tenant." *Held*, under the circumstances, no error. *Lykens Coal Co. v. Dock*, 571

55. *Right to use tramways.*—Where the coal upon severance has become the property of the lessee, he has the right to enter and remove it, and to use the tramways for such purpose. *Id.*

56. *Tenant overstepping bounds—Notice to quit.*—Jones, one of the defendants, having a lease of a certain portion of the complainant's slate quarry, paying at an agreed rate per square for all slate quarried and manufactured therefrom, without obtaining consent thereto opened another portion of the quarry adjoining the demised premises, and for several years quarried slate therefrom, *paying rent* at the same rate as he paid for slate from within the bounds of his lease. *Held*, that such use of the quarry outside of the lines of his lease did not constitute him a tenant from year to year; that the only interest he acquired was a right to remove that portion of the slate which he had been to the expense of uncovering, and that he was not entitled to the statutory notice to quit, but only to a reasonable time to get the slate he had so uncovered. *Sheldon v. Davey*, 581

57. *Idem—Waiver of notice.*—*Held further*, that having agreed to quit that portion of the quarry in dispute by a day certain, such agreement was a waiver of all claim for further time to work and remove the slate. *Id.*

58. *Lessor excluded from mining.*—A mining lease for a term certain, saving only to the lessor the right of tillage, is exclusive, and the lessor can not mine himself within the tenement. *Barker v. Dale*, 597

59. *Lessor not bound to repair.*—A lessor is under no general obligation to put premises in repair, and his covenants to do so are not to be enlarged beyond their fair intent. *Clark v. Babcock*, 599

60. *Lessee's option to perform lessor's covenants and charge against the rent.*—A lease of a saw mill and salt works to be run in connection with it was made on February 16th, for a year from February 1st. The lessor was made liable to a deduction of rent for delays caused by breakage, etc., and the lease was made on the basis that the mining year began May 15th and continued only six months. It required the lessor, by

LEASE. *Continued.*

a date certain, to put the premises in repair, in default of which lessee was authorized to make the necessary repairs and charge them against rents. Sufficient time was allowed him to make such repairs between the date limited to the lessor and the commencement of the season. *Held*, that the lease did not authorize the lessee to claim damages for the lessor's delay or neglect to repair, the lease providing its own remedy in such case. *Id.*

61. *No covenant for capacity.*—The lease of a salt well implies no covenant that the well shall be of any particular productive capacity. In the absence of any distinct agreement the lessee takes it as he finds it. *Id.*

62. *Lease distinguished from license—Divisibility of leasehold interest.*—The owner of a tract of phosphate land, for the consideration of \$2,000, granted to defendant "the right and privilege of entering in or upon, by himself or his agents, all or any part of the land, for the purpose of searching for mineral and fossil substances, conducting mining operations to any extent," and to use and appropriate all minerals that might be found "by any person or persons, or contained in" the tract, for the term of ten years. *Held*, a grant of the phosphate beds, with the exclusive right to work them for the term, and not a mere license, and that the grantee had the right to divide his interest and convey part of it to others. *Massot v. Moses*, 607

63. *Controlling clause.*—The expression "that may be found by any person or persons or contained in any part" of the land, distinguishes this from *Lord Mountjoy's Case* and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed and intended as compensation for the right granted. *Id.*

64. *Cases cited.*—The principal cases on the distinction between grants, leases and licenses to mine reviewed, and the principles deducible from them stated. *Id.*

65. *A grant for a term of years of the exclusive right* to take phosphate is a demise of the phosphate beds contained in the land. *Id.*

66. *Facts of the case—Lessee for uncertain term working by instroke.*—Tenant for life demised the coal under a piece of land for twenty-one years (and for sixty years subject to the question of his right to demise for such longer period, which point was ultimately decided against him) the lessee covenanting to work the mines in a proper and workmanlike manner and to deliver up the works in good condition, so that such coal works might be continued. The lessees worked under the demise by instroke from an adjoining colliery, situate to the rise of the coal in the demised land, and did not sink a pit so as to work the demised coal from the deep. They kept no barrier between the two collieries, so that water and air passed from their other colliery, through the demised colliery, into a lower colliery. They also continued to work the demised coal after the expiration of the twenty-one years, claiming to be entitled for sixty years, which claim was, after much litigation, decided to be invalid as against the reversioner. Upon these facts the court *held*:

LEASE. *Continued.*

Instroke.—That working by instroke was working in a proper and workmanlike manner. *Jegon v. Virian*, 628

67. *Working from the deep.*—That they were not bound to sink a separate pit (shaft) for the demised coal. *Id.*

68. *Measure of damages.*—That the value of the coal, raised by the lessees after the expiration of the twenty-one years' lease, was to be paid for by them at its fair market value as if they were purchasers, all expenses of hewing and raising being allowed. *Id.*

69. *Continuous working.*—That under the terms of the lease the lessees were not liable in damages for not working the coal continuously.

70. *Barriers.*—That lessees were not bound to keep up a barrier so as to prevent air and water from flowing through the lessor's mine, and were not liable to pay for way-leave or air-leave. *Id.*

71. *Special damages—Way-leave defined.*—That the lessees were liable for any damage done beyond the removal of coal, by working the mine *since the determination* of the twenty-one years' lease, and must also pay for way-leave; that is, for the passage of coal through the lessor's mine since the determination of that lease. *Id.*

72. *Mutual mistake—Contract to sink for oil where none exists.*—A party covenanted to sink for oil within twelve months or pay \$25 per annum until work commenced. In action for this sum the defense was that the contract was founded on a mutual mistake as to the existence of oil on the lands. *Held*, that it was a penalty, and not liquidated damages. 2. That the defense was one which should have caused a transfer of the case to equity; and 3. That if the defense were true, it would in no event justify a recovery of more than nominal damages. *Bell v. Truit*, 649

73. *Expenses of "winning" where separate seams are worked.*—By deed of grant and license the licensee was allowed to win and work all the coal mines and seams of coal under certain lands, and, in the first place, out of the profits to reimburse himself all expenses incurred in the winning thereof; and from that time he was to pay a royalty to be fixed. There were three seams of coal under the land. The licensee reached one of them by a driftway from an adjoining colliery and worked the coal; by similar means he afterward reached and worked another of them; the third was reached but abandoned as worthless. *Held*, that the coal was *won*, according to the meaning of the deed, as soon as the first seam was reached through the driftway so it could be worked; that the deed did not contemplate a distinct winning in respect of each seam; and that therefore expenses incurred after the first seam had been reached could not be treated as expenses of winning. *Rokeby v. Elliot*, 651

74. *Void lease validated by receipt of rent.*—The reception of rent for a great length of time may confirm a lease which may have been void in its inception. *Griffin v. Fellows*, 657

75. *Lessee can not open mines.*—The opening of mines by the lessee where none were open at the time of the letting, with no provision in the lease allowing such privilege, would work a forfeiture and allow the lessor to recover in ejectment. *Id.*

LEASE. *Continued.*

76. *By the demise of farming lands* a covenant is raised that they shall be used as such, and other covenants are implied as to waste and good husbandry. *Walker v. Tucker*, 673

77. *Use of recitals in construction.*—The recitals preceding the operative words may be used to reach the intention when the operative words are of doubtful meaning, but they can not control the operative part where it is clear and unambiguous. *Id.*

78. *Idem.*—Recitals which do not express all that is included in the operative part of an instrument can not be held to be a full and clear expression of the intention of the parties. *Id.*

79. *Construction of lease for joint farming and mining.*—Where an agreement in its recitals stated that, whereas, etc., the parties of the first part are desirous to lease and convey the right of mining, and in the granting clause the demise was of the said "farming lands," "together with the right to mine," and "together with the enjoyment of so much of the surface of said lands," as might be necessary to carry on the mining, it was held, that the right to the farming land was as definite as the right to mine. *Id.*

80. *Eviction in such case.*—Where the lessee under a lease allowing him both to farm and to mine, is prevented from exercising the right to farm, it is an eviction, and such eviction is a good plea to an action for breach of the covenants of the lease. *Id.*

81. *Failure of minerals demised.*—Where the thing let turns out to be a nonentity, the lessee is not bound.

PER THE LORD CHANCELLOR: In such a case it is perfectly reasonable that the lease should be subject to reduction.

PER LORD CHELMSFORD: Where there is a total destruction or exhaustion of the subject-matter of a lease, the lessee is entitled to abandon it. *Gowan v. Christie*, 688

82. *Perils of the adventurer.*—The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all risk of its failure both as to quantity and value, unless either is warranted. *Id.*

83. *Dissimilarity of mining and farming leases.*—A mining lease is practically a sale of a portion of the land: *dicta*, therefore, applicable to agricultural leases, are not always applicable to leases of minerals. *Id.*

See ABANDONMENT, 1; CONTRACT, 5; CONVEYANCE, 4; COVENANTS; EJECTMENT, 1; FIXTURES, 1; FORFEITURE; FRAUD, 1; INSPECTION, 1-3; INSTROKE, 1; LACHES, 7, 9, 21; MEASURE OF DAMAGES, 1; MISTAKE, 2-4; PERSONAL PROPERTY, 1, 2; RENTS; WASTE, 1; WORKINGS.

LICENSE.

1. *Not transferable.*—A mere license in writing to mine, remove and sell coal, etc., the product of such mining to be paid for at a given price per ton, is not transferable either by assignment or deed so as to pass any legal right or title. *Manning v. Frazier*, 307

See LEASE, 8, 62-65; STATUTE OF FRAUDS, 1.

LIEN.

1. *Vendor's lien for price of mineral in ground sold.*—Where the

LIEN. Continued.

owner of land, by deed, bargains, sells and conveys to another, his heirs and assigns, all the coal, limestone, iron ore, rock oil and other mineral in, upon or under the land, with an express license to the grantee, his heirs and assigns and laborers, to enter and search for said minerals and to dig, mine, explore and occupy with the necessary structures, etc., and to mine and remove the coal, etc., for which grant the purchaser agrees to pay to the grantor a stipulated price per ton for the various minerals removed, payable quarterly, the grantor will have a vendor's lien on the coal and mineral not mined and removed, for the purchase money, which he may enforce by a sale of the coal and mineral not taken from the ground. In such case the amount of the purchase money falling due each quarter depends upon the quantity of coal, etc., mined and removed from the land during the three months next preceding. The price agreed to be paid per ton is only a mode of ascertaining the amount of purchase money to be paid for the conveyance of the coal, etc., in the mine. *Manning v. Frazier*, 307

2. *Same—Waiver of lien—Its extent.*—If a deed conveying coal and other mineral in the ground on a credit, to be paid for quarterly as the same are mined and removed, authorizes the sale of the coal, etc., before payment is to be made, that will only be a waiver of the vendor's lien *pro tanto* for what is thus removed, but not for the coal, etc., still in the mine. *Id.*

LODE—See MINES, 1.

MEASURE OF DAMAGES.

1. *Measure of damages against overstepping tenant.—Decreed*, that the defendants must account for all slate taken from outside of the demised lines since the date they had agreed to remove, at what it was worth at the date when taken from the quarry. *Sheldon v. Davey*, 581

2. *Penalty—Liquidated damages.*—The law prefers to treat a sum payable as a penalty rather than as liquidated damages, because then it may be apportioned to the actual loss. *Bell v. Truit*, 649

See CONFUSION 1, 2; LEASE 50, 51, 54, 68, 71; RENTS AND ROYALTIES, 3.

MERGER—See LEASE, 25.

MINERALS.

1. *The term "minerals"* embraces everything not of the mere surface used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils are comprehended within it. *Griffin v. Fellows*, 657

See LAND, 2.

MINES.

1. *Mine unopened is no mine.*—A mine is not properly so called till it is opened; it is but a vein before. *Astry v. Ballard*, 816

MISTAKE.

1. *Mistake vacates settlement.*—Successive annual statements are disturbed by the court with regret. But payments accepted as in full of ac-

MISTAKE. *Continued.*

count, which account is itself wrong and *ex parte*, do not amount to accord and satisfaction, and only amount to partial payments. *Perry v. Attwood*, 441

2. *Necessity of mistake to be mutual.*—Leasees supposed they were getting under their lease the exclusive right to the premises for all purposes. Lessors signed under the belief that it gave the right to quarry only. *Held*, no ground for correction by a court of equity, the mistake not being mutual. *Brainerd v. Arnold*, 478

3. *Mistake no ground for cancellation.*—Where mistake in the terms of a contract has occurred, it is no ground to annul the entire contract but for reforming it according to the truth. *Id.*

4. *Mutual mistake as to existence of veins.*—If the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he can not have relief in an action in affirmance of it. He can not recover for his outlays in seeking for the supposed veins. *Harlan v. Lehigh Coal Co.*, 497

See CORPORATIONS, 1; LEASE, 37, 72.

MORTGAGE.

1. *Irregularities on execution sale, waived by delay.*—A sale made at four o'clock in the forenoon does not conform to the statute and renders the sale voidable, and so also does a sale of property *en masse* where it was susceptible of division; but by unreasonable delay amounting to laches the debtor loses the right to have the sale set aside. *Rigney v. Small*, 217

2. *Outstanding mortgage will not defeat ejectment.*—A defendant in ejectment can not set up an outstanding mortgage of the plaintiff, either to show title in a stranger, or to show a variance between the title claimed and the title proved. *Burr v. Spencer*, 450

See LACHES, 10.

NOTICE—See VENDOR AND PURCHASER, 2.

OIL—See EJECTMENT, 1; LEASE, 42, 72.

PARTITION—See IRRIGATION, 11.

PARTNER—See FRAUD, 1; LACHES, 4.

PATENT.

1. *The Ditch Act construed with reference to prior patents.*—The act of Congress of July 26, 1866 (R. S. § 2339), is not retrospective in its operation, and does not in any manner qualify or limit rights acquired under a patent issued before the act became a law; but rights acquired by priority of possession were by that act confirmed, and are entitled to protection as against one claiming as riparian proprietor merely, through a patent subsequently issued, and when no right had vested in the patentee before the passage of the act. *Union M. Co. v. Ferris*, 91

2. *Riparian rights before patent—Act of July 26, 1866.*—One who has entered and paid for land and received a certificate of purchase, but no patent, is yet entitled to claim and exercise riparian rights; and so, too, of one who has entered land under the Homestead Act, and one who

PATENT. *Continued.*

entered and paid for his land prior to the passage of the act of Congress of July 26, 1866, is not affected by it. *Union M. Co. v. Dangberg*, 113

PERSONAL PROPERTY.

1. *Coal broken becomes personalty.*—L. leased coal mines to F., to have "the right to mine, carry away and dispose of" coal. F. having mined coal, which remained in the mine just as it fell from the breast, made an assignment for creditors. *Held*, that the coal was personal property and passed to the assignee, and trover would lie for it against L. to prevent its removal, provided its removal did not essentially injure the mine. *Lykens Valley Co. v. Dock*, 570

2. *Idem—Removal of loose coal by assignee subject to lessee's covenants.*—If the coal could not be removed without material injury to L., F.'s right of property was not complete and final, because of his obligation to mine in the most approved method and leave the mines in good order. *Id.*

PLEADING AND PRACTICE.

1. *Assignment of errors not a statement of facts.*—An assignment of errors can not be received by an appellate court as a statement of facts in favor of the party making such assignment. *Fleeson v. Savage M. Co.*, 153

2. *Waiver of technical exceptions.*—If technical exceptions be not brought to the notice of the court in a formal manner and at a proper time, it will be presumed that the party elects to proceed on the merits. *Watts' Appeal*, 222

3. *Action by shareholders against directors.*—Where mismanagement by directors of a corporation is so gross as to amount to fraud, a bill may be maintained against them personally by a shareholder. A shareholder may, under proper circumstances, interpose for the protection of the corporation. *Id.*

4. *No procedendo when recovery impossible.*—The court will not issue a *procedendo* upon reversal of judgment, when it is apparent that a set-off which must be allowed will exceed the plaintiffs' claim. *Emery v. Owings*, 379

5. *Instructions not based on evidence.*—There is no error in refusing instructions not based upon the evidence in the case. *Alderson v. Ennor*, 526

See COSTS, 1, 2; COVENANT, 1, 2, 4; EQUITY, 1; FRAUD, 4; JURISDICTION; JUROR.

PRINCIPAL AND SURETY.

1. *Practice—Suit on indemnity bond.*—The obligee in a bond to indemnify against claims may sue as soon as a claim is made, without waiting for judgment or even till a suit be commenced. *Ardesco Oil Co. v. North American Co.*, 589

See RENTS AND ROYALTIES, 10.

PUBLIC DOMAIN.

1. *The government has an unqualified right* to dispose of the public land; a stream of running water is part and parcel of the land through which it flows, and the use of it as an incident to the soil passes to the

PUBLIC DOMAIN. *Continued.*

patentee, who can only be deprived of it by grant, or by the existence of circumstances from which it is the policy of the law to presume a grant.

Union M. Co. v. Ferris,

91

See STATUTE OF LIMITATIONS, 2; WATER, 2.

QUARRIES—See LAND, 3.

REAL ESTATE.

1. *The "Connecticut title" to lands in the "17 townships" of Luzerne county considered. Griffin v. Fellows,*

657

See LAND.

RESCISSION—See MISTAKE, 3.

RELEASE—See CONSIDERATION, 1.

RENTS AND ROYALTIES.

1. *Royalty on coal sold at pit's mouth—Plain covenant not left to parol testimony.*—A lessee of coal mines to pay a rent certain and a certain share of such sums of money as all or any of the coal should sell for at the pit's mouth, is not liable under such covenant to pay to the lessor any part of the money produced by sale of the coal elsewhere than at the pit's mouth; and evidence of the lessees having accounted with the lessor and paid him the share of money produced by the sale of coal elsewhere, is not admissible to explain the intention of the parties. *Clifton v. Walmesley,*

323

2. *Alternative rent covenants—Double recovery not allowed.*—Where the lease contained a covenant to raise a certain quantity of ironstone during each quarter, and pay certain royalties upon it, or else to pay a certain fixed quarterly rent: *Held*, that the landlords, having declared upon breaches of both the above covenants, and money having been paid into court and accepted in satisfaction of the latter, were entitled to nominal damages only in respect to the former. *Foley v. Addenbrooke,*

349

3. *Damages—Application of payments.*—Money paid as rent and received as such under agreement, can not be applied on an account for damages though arising out of the same subject-matter. *Emery v. Owings,*

379

4. *Election of mode of payment of rent, determined.*—The lessees of a mine covenanted to pay forty cents a load for the ore taken, but were at liberty to substitute an annual sum, at their election, to be made at the end of the first year; but in case they did not so elect, they covenanted to take out annually, and pay for, 800 loads. No substitution was in fact made at the end of the year. *Held*, that their covenant to pay at the said rate for each load became positive, absolute and indefeasible. *Fisher v. Milliken,*

395

5. *Ore settlements not conclusive.*—Settlements between lessor and tenant of mines of amounts of ore got and tonnage paid, are not conclusive when shown to be erroneous or made in ignorance, and such error may be shown in an action on the covenants of the lease, and need not first be reformed in equity. *Perry v. Attwood,*

441

6. *Settlements, no discharge.*—In a lease of a coal mine, the lessee

RENTS AND ROYALTIES. *Continued.*

stipulated that he would pay a rent for coal taken out and also mine a certain number of tons annually. *Held*, that settlements for coal taken out were not a discharge of a breach in not taking out the stipulated quantity. *Powell v. Burroughs*, 531

7. *Covenants distinguished.*—The covenant for rent for coal mined is distinct from the covenant to mine a certain quantity. *Id.*

8. *Relation of covenant for sleeping rent* to the covenant to work the mine considered, upon the view that so long as this rent is paid the covenant to work is inoperative, such rent being the alternative to a covenant for royalty and a payment to the lessor while he keeps his coal. *Wheatley v. Westminster Brymbo Co.*, 554

9. *Specific consideration, distinguished from rent.*—A covenant to pay moneys already due to others as the consideration of a sub-lease, will not be construed like rent, to become due after the land has been enjoyed; they must be considered as intended to be paid either forthwith or within a reasonable time. *Ardesco Oil Co. v. North American Co.*, 589

10. *Sub-lessee held as principal debtor.*—By the obligation of the sub-lessee to pay his lessor's debts, he became the principal debtor, and his lessor the surety, and was bound on demand to exonerate his lessor, although the original creditor may not have demanded payment. *Id.*

See LAND, 3, 4; LEASE; SET-OFF, 1.

RESERVATION.

1. *Reservation of minerals in Inclosure Act.*—An Inclosure Act directed allotments for public and specific purposes, and that one fifth should be allotted to the lord of the manor for his interest in the "soil," and that the residue should be divided among the commoners, to be held in severalty. And it was declared that the lord might enjoy "all mines, minerals, quarries and other royalties," as if the act had not been passed. *Held*, that the lord retained his rights to the mines and minerals allotted to the commoners in severalty. *Pretty v. Solly*, 801

See LEASE, 6.

RIPARIAN RIGHTS.

1. *Nominal injury to riparian rights.*—The right of a riparian owner to have the water of a stream run through his land is a vested right, and any interference with it imports at least nominal damages, even though there be no actual damage. *Creighton v. Evans*, 123

2. *Rights of lower proprietor.*—Each riparian proprietor has the right to have the water of a stream running in a defined channel continue so to flow, except so far as the same may be appropriated for domestic use, stock, and reasonable irrigation. *Coffman v. Robbins*, 131

See PATENT, 2; PUBLIC DOMAIN, 1; WATER.

SALINES—See LEASE, 42, 60, 61.

SET-OFF.

1. *Offset of rent in trover.*—In trover against the lessor for taking his tenant's coal, rent can not be allowed as an offset. *Lykens Valley Co. v. Dock*, 571

2. *Waiver of set-off, to save forfeiture.*—A sub-lessee of premises sub-

SET-OFF. *Continued.*

ject to forfeiture for non-payment of royalty and other debts in arrear, in consideration of obtaining his sub-lease, covenanted to pay the royalty in arrear and accruing rent and the other debts. In suit on his covenant it was *held* such agreement implied a waiver of his right to plead a set-off.
Ardesco Oil Co. v. North American Co., 589

SOIL—See LEASE, 16, 29, 76, 79, 83; MINERALS, 1.

SPECIFIC PERFORMANCE.

1. *Vendor unable to pass minerals*.—Specific performance of contract for sale of land not decreed where the vendor can not make title to the minerals. *Pretty v. Solly*, 301
 See LACHES, 7; LEASE, 53.

STATUTE.

1. *Rule of construction*.—When a statute gives a power, what is necessary to make it effectual is given by implication. *Com. v. Conyngham*, 32
 2. *Construction of statute* by the rule that the particular enactment controls the general enactment, and by reference to the context. *Pretty v. Solly*, 301
 See CRIMES, 1.

STATUTE OF FRAUDS.

1. *Executed license—Estoppel*.—Y. and N. agreed, but not in writing, to construct a ditch for the conveyance of water with which to irrigate their lands and to share equally in using the water. N., whose land was above that of Y., diverted all the water of the ditch, and thereby injured Y.'s crops. In an action on the case for diverting the water, *held*, that the agreement was not within the Statute of Frauds, and that it was in the nature of an executed license, which N. was estopped to revoke.
Yunker v. Nichols, 64
 See LEASE, 52.

STATUTE OF LIMITATIONS.

1. *Prescription*.—The right to divert water from its natural channel under the common law or the civil law, can be acquired by prescription only. *Arnold v. Foot*, 83
 2. *The Statute of Limitations* does not run against the United States. *Union M. Co. v. Ferris*, 91
 3. *In favor of trustees*.—Even if the directors were held to the liabilities of a trust relationship, six years would bar an action for misuse of the corporate property. *Watts' Appeal*, 223
 See LACHES, 16.

STOCKHOLDER—See INSPECTION, 14; JUROR, 1; LACHES, 13.

STONE—See LEASE, 15.

SURFACE SUPPORT.

1. *Loss of surface support and flooding endangered by removing pillars*.—The defendants having worked out the main body of ore from the mine, proceeded to get ore by reducing the pillars which had been left for support, and thus endangered the caving of the surface and the flood-

SURFACE SUPPORT. *Continued.*

ing of the mine by letting the waters of a swamp into the workings, whence it would flow to plaintiff's mine. *Held*, that an injunction to restrain defendants from weakening the supports was properly granted.

Thomas Iron Co. v. Allentown M. Co., 36

See LEASE, 39, 44.

TENANT IN COMMON—See DITCH, 1.

TIME—See FORFEITURE, 2.

TRESPASS.

1. *Waiver of trespass.*—Where mineral has been taken by trespass and converted into money the *tort* may be waived and assumpsit brought for the proceeds. *Alderson v. Ennor*,

526

See MEASURE OF DAMAGES, 1.

TROVER—See SET-OFF, 1.

TRUST—See STATUTE OF LIMITATIONS, 3.

USAGE.

1. *Usage aids construction.*—An ancient grant is to be construed by evidence of the manner in which the thing granted has always been possessed and used. Even if the right to mine were doubtful it *seems* it might be implied from long continued acquiescence. *Griffin v. Fellows*,

658

VENDOR AND PURCHASER.

1. *Purchaser subrogated to rights of vendor.*—Where property of which a defective lease has been granted is subsequently sold, the purchaser takes the property subject to the burden of any delay of which the vendor may have been guilty; and in reference to a defense founded on laches, the purchaser can stand in no better position than the vendor would have done if he had never parted with the property. *Ernest v. Vivian*,

205

2. *Purchase without notice.*—The defense of purchase for valuable consideration, without notice, is available when the subject-matter purchased is an equitable estate. *Id.*

See DITCH, 4; FAULTS, 2; LACHES, 8; LIEN, 1, 2; SPECIFIC PERFORMANCE, 1.

WARRANTY.

1. *Warranty, when implied.*—A warranty may be implied when our common sense of justice requires it, and it is essential to complete the definition of the relation intended to be established between the parties, but its terms must be clearly deducible from the instrument and from the nature of the transaction. *Harlan v. Lehigh Coal Co.*,

496

See WORKINGS, 4.

WASTE.

1. *Waste.*—Making of new mines is waste unless the lease is of all mines on the land. *Owings v. Emery*,

387

WATER.

1. *Right to convey water over another's land.*—In Colorado, lands are

WATER. *Continued.*

held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands; but whether this right rests in grant, or upon the statute, or in the necessities of a dry climate, diverse opinions are expressed by the several judges. *Yunker v. Nichols*, 64

2. *Government title to streams in public land.*—Before title to public lands is acquired from the government of the United States, no occupancy or appropriation of the water flowing through the same, nor State legislation, nor decision of State courts, can in any manner qualify, limit, restrict or affect the operation of the government patent. *Union M. Co. v. Ferris*, 90

3. *Presumptive grant of water-rights.*—If the owner of a tract of land for which he holds patent from the government, through which land a stream of water flows, has, by reason of the adverse possession and use of the stream by an upper proprietor, presumptively granted to the latter the use of the stream for purposes of irrigation, such grant does not affect lands on the same stream acquired by the lower proprietor after such presumptive grant had its origin. *Id.*

4. *Use of water, when adverse.*—The use of water by a riparian proprietor is not adverse unless it appears that its use causes such injury to another as would justify an action for its redress. *Id.*

5. *Use of water by riparian proprietor.*—A riparian proprietor may make a reasonable use of the water of a stream for purposes of irrigation, but before he can acquire a right to the water by adverse use or prescription, the burden is on him to show that his use has amounted to an actionable invasion of the right of another. *Id.*

6. *Unreasonable use of water.*—A use of water which is unreasonable is such as works actual, material and substantial damage to the common right; not to an exclusive right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor. *Union M. Co. v. Dangberg*, 113

7. *Use of water for domestic purposes, etc.*—Every proprietor may, in the exercise of the common right, consume so much water as is necessary for his household and domestic purposes, and for watering his stock. *Id.*

See ADVERSE POSSESSION, 1; APPROPRIATION, 1; PUBLIC DOMAIN, 1; RIPARIAN RIGHTS.

WAY.

1. *Passing around obstructed way.*—Where one has a right of way over another's land, and the way is not defined, if the owner of the land stops up the way which is in use, the other party will be justified in going over another part of the land. *Farnum v. Platt*, 330

See LEASE, 55, 71; WATER, 1.

WITNESS.

1. *Disinterested witness.*—The assignee of the lessees of a mine who had paid for as many loads of ore as he was bound to pay for by the contract of assignment, and who does not appear to be responsible to any one—not to the landlord, because he had performed his agreement with him,

WITNESS. *Continued.*

and not to the lessees, because he was bound to perform no covenant but his own—is disinterested, and therefore a competent witness. *Fisher v. Milliken*, 396

WORKINGS.

1. "*Coal raised.*"—The term "coal raised" may signify "coal got or won" or "coal brought to the surface," according to the context. *Senhouse v. Harris*, 508

2. *Winning defined.*—A coal field is won when full, practicable, available access is given to the coal hewers, so that they may enter on the practical work of getting the coal. *Rokeby v. Elliot*, 651

3. *Exhaust of mine, a question of fact.*—Whether a coal mine is exhausted or not is a question of fact to be determined by the jury, and evidence of usage or custom is admissible to enlighten them. *Walker v. Tucker*, 673

4. "*Unworkability to profit*" at common law affords no ground for reducing or throwing up a lease of minerals which are in their nature subject to many vicissitudes. There is no warranty in such case to the lessee. *Gowan v. Christie*, 688

See INSTROKE; LEASE.

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